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BRIEF OF APPELLANT

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920

No. [redacted]167

THE BANKERS TRUST COMPANY, Appellant,

vs.

THE CITY OF RATON and THE RATON WATER WORKS COMPANY, Appellees.

Appeal from the District Court of the United States for the District of New Mexico.

ALVA B. ADAMS,
ROBERT S. GAST,
Solicitors for
The Bankers Trust Company,
Appellant.

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I

STATEMENT OF THE CASE

The Bankers Trust Company, a New York corporation, instituted this action in the United States District Court for the District of New Mexico against the City of Raton and The Raton Water Works Company, for the purpose of protecting from impairment, conversion and destruction contracts and other property conveyed to it as trustee by the appellee, The Raton Water Works Company, to secure the payment of an issue of bonds of said Water Company. The City of Raton filed a motion to dismiss plaintiff's action which motion was sustained and a judgment of dismissal entered from which this appeal is prosecuted. As the motion of the defendant admits the truth of the allegations of the bill, the facts before the Court are those contained in plaintiff's amended bill (Record pp. 13-23, 26).

These admitted facts so far as material to the issues are as follows: In 1882 the Raton Water Company was incorporated. This corporation constructed a water works system and furnished water to the inhabitants of the territory which is now included within the limits of the present City of Raton, until April, 1892. No town, city or other municipal organization existed which included any part of the present City of Raton until the incorporation of the town of Raton in the year 1890. The water supply of the Raton Water Company, prior to the incorporation of said town, had been furnished by a pumping plant, a reservoir near the settlement, and a pipe line from springs. With the growth of the community the supply of water from these original sources became indeaquate and shortly after the organization of the town of Raton the officials and citizens thereof induced the organization and incorporation of the Raton Water Works Company, one of the defendants, for the purpose of securing an enlargement of the water supply system of the town.

In July, 1891, the Town of Raton by means of an ordinance regularly passed by its board of trustees entered into a contract with the Raton Water Works Company by which the company agreed to provide a water supply and to construct and provide a water plant with pipes, reservoirs and necessary appurtenances and equipment to furnish an adequate supply of water to the town of Raton and to the inhabitants upon certain terms and conditions set forth in said contract, and to have said water works completed so as to furnish water to said town by July 1, 1892. In consideration thereof the town of Raton agreed with the Raton Water Works Company that said town would not operate or maintain water works in and near the town or Raton for the purpose of supplying said town or the citizens thereof with water for domestic, manufacturing or sanitary purposes for

the period of twenty-five years from July 25, 1891. This contract contained numerous provisions in reference to the construction and rental of fire hydrants and the payment therefor, and other regulations governing the construction and operation of the company's water system. This contract is contained in and evidenced by an ordinance of said town known as "Ordinance No. 10 Granting franchise to Raton Water Works Company to erect and maintain water works" and was ratified by the qualified voters of the town at an election held in August, 1891.

Following the incorporation of the Raton Water Works Company on July 15, 1891, and the making of the contract with that company with regard to the furnishing of water to the town and its inhabitants, the officials of said town, after an examination of the various available sources of supply selected and designated as the best available source the present source of supply from Sugarite Creek, an entirely different source than that from which the Raton Water Company had derived its supply. The new company thereupon began and carried to completion its water system taking the water of Sugarite Creek so selected by said town as the source of its supply. In April, 1892, the Raton Water Works Company purchased all of the property and succeeded to all of the rights of the Raton Water Company, including its pipes, mains, easements, and rights of way in the streets and alleys of said town and thereafter and now uses the same for the distribution of its water and the supplying of its customers.

The Raton Water Works Company is organized under the laws of New Mexico as a corporation for the purpose of supplying water for domestic, irrigating, manufacturing and fire purposes to cities, towns, and the inhabitants thereof, and particularly for the purpose of furnishing water for such purposes to the city of Raton. This corporation was formed under and by virtue of the provisions of an Act of the General Assembly of the Territory of New Mexico passed February 24, 1887, being Chapter XII of the Session Laws of the General Assembly of New Mexico for the year 1887.

This statute grants to corporations formed under its provisions the right to lay and maintain pipes and mains in the streets of the town or city it was incorporated to supply with water without any action by such town and without any limit upon the duration of the rights so granted. The pertinent provisions of this statute are hereinafter set forth.

Pursuant to and in exercise of the powers granted it by its charter and the laws of New Mexico and as the successor in rights of the Raton Water Company, and in fulfillment of its contract with the town of Raton, the Raton Water Works Company constructed its water works system and has continuously

furnished or been prepared to furnish the city and its inhabitants water for domestic, manufacturing, irrigating and fire purposes and performed all of the terms and conditions of its contract and has complied with the laws of New Mexico and the provisions of its charter. This company further constructed and maintained an extensive system of mains, pipes and other appurtenances in the streets and alleys of the city of Raton, in addition to those purchased from the original Raton Water Company, and has used the same for the purpose of supplying water to the city of Raton and its inhabitants and until the happening of the acts complained of, earned and collected therefore large sums of money each year in payment for water furnished through these pipes and mains from the reservoirs and water rights of the company.

One of the principal consumers of water from the system of the defendant water company was the Atchison, Topeka & Santa Fe Railroad Company with which company it entered into a contract to furnish said railroad company a supply of water for a long period of years extending until 1931.

In February, 1905, the defendant The Raton Water Works Company executed and delivered a deed of trust conveying to the Manhattan Trust Company, as trustee, all of the rights, privileges, franchise, contracts, and property of every kind then owned or thereafter to be acquired by said company, including the rights-of-way, franchises and contracts granted by the State of New Mexico, and by the town of Raton, and including the plant and water works and all water rights, pipes and other property connected with or appertaining to the water works system, also including th econtract with the Atchison, Topeka & Santa Fe Railroad Company, for the purpose of securing an issue of bonds aggregating $300,000. This mortgage or deed of trust was duly recorded at or about the time of its execution and all of the said issue or $300,000 of bonds were duly executed and are outstanding in the hands of holders in due course and for value and none of said bonds have been paid or otherwise cancelled or satisfied. As a result of the acts of the City of Raton set forth in the bill and summarized hereafter, the company has defaulted in the payment of all interest on said bonds since 1915. The Bankers Trust Company, appellant herein, has duly succeeded to all of the rights, duties and obligations of the Manhatton Trust Company under the provisions of said deed of trust and is now the duly qualified and acting trustee under said mortgage or deed of trust.

Appellant's bill charges that notwithstanding the construction of such water system at the instance of said town of Raton and the granting of exclusive rights and contracts by said town, and the franchise and rights granted by the territory of New

Mexico by the statute under which said Raton Water Works Company was incorporated, the City of Raton began in 1912 a series of steps and acts with the intent and result of impairing the contracts between said water company and the said town and City of Raton, the territory, now State of New Mexico, the Atchison, Topeka & Santa Fe Railroad Company, and the individual consumers of water from said water system and of destroying and wrecking the business of said company and of confiscating and taking its water rights and other property.

The acts done to this end by the city and recited in said bill may be summarized as follows: In April, 1912, four years before the expiration of the period during which the exclusive right to furnish water to said city and its inhabitants, granted by the contract mentioned, would expire, the City voted an issue of $400,000 in bonds "for the purpose of erecting and constructing a system of water works for fire, domestic and other municipal purposes to be owned, managed and operated by the city." Thereafter, in July, 1913, defendant city duly passed an ordinance known as Ordinance No. 186 which provided that a system of water works for fire, domestic and other municipal purposes to be owned, managed and operated by the City of Raton be erected and constructed by the city of Raton to supply the inhabitants of said city. Pursuant to the provisions of said ordinance and the voting of said bonds the city of Raton constructed and completed a water works system to supply water to the inhabitants of the City of Raton, and during the life of the exclusive franchise contract referred to above, the city of Raton induced many of the customers of the Raton Water Works Company to abandon the water service of the defendant company and to enter into contracts with the city for the furnishing of water and before the expiration of said exclusive contract herein was furnishing water from its own system to a large portion of the inhabitants of Raton and for fire hydrants and other municipal purposes.

The City of Raton in order ot carry out its purpose of destroying the business of the water company and of confiscating its water rights, franchises and other property, ordered said water works company to tear up and remove its pipes and mains from the streets of the City of Raton and if the said company does not do so, threatens to tear up and destroy the pipes and mains in the streets, alleys and public places of the city and thereby absolutely and completely deprive said company of its pipes and mains, rights of ways and franchises and of all opportunity of furnishing water for domestic, irrigating and manufacturing and other purposes to the City of Raton, its inhabitants or to the Atchison, Topeka & Santa Fe Railway Company or to other consumers and it is the declared intention of the defend-

ant city to take over the exclusive business of furnishing water to the city of Raton and its inhabitants and to exclude the Raton Water Works Company entirely from said City. That said City of Raton on the Sixth day of August, 1915, duly passed a certain ordinance known as Ordinance No. 197 which provided among other things as follows:

"Now, therefore, be it ordained by the city council of the City of Raton:

"Section 1. That the ordinance entitled 'Ordinance No. 10, Granting Franchise to the Raton Water Works Company, to Erect and Maintain Water Works,' passed July 20th, 1891, and published July 24th, 1891, as amended by Ordinance No. 104, and all ordinances amendatory thereof, be and hereby are repealed, and the franchise therein granted be and the same are hereby revoked, and all rights and privileges therein granted, or thereby permitted, are null.

"Section 2. That said Raton Water Works Company be and it is hereby directed and required immediately to remove from the streets, alleys, lanes, roads and other highways and grounds and public places within the City of Raton its pipes, conduits, structures and works of every kind and character, used or capable of being used in connection with its water works system in said city of Raton.

"Section 3. That the Mayor, Clerk and City Attorney of said city be and they are hereby authorized and directed to take all such steps as may be necessary on behalf o fthe City of Raton to effectuate the provisions of this ordinance."

The City of Raton in addition to entering the business of furnishing water in violation of its contract with the Raton Water Works Company and seeking to destroy it as a competitor by cancelling its franchise and compelling it to take up its mains in violation of its rights under the statutes, is also proceeding without process of law, to confiscate and convert to its own use the water rights and reservoir sites belonging to the Raton Water Works Company.

The only source of water supply for the water works system of the Raton Water Works Company was and is the waters of Sugarite Creek and those impounded in three reservoirs belonging to the company. The entire amount of water available and supplied by said source was used and consumed by the Raton Water Works Company in supplying its customers prior to the construction of the water system of the City of Raton. Notwithstanding these facts the City of Raton has so constructed its

system that its only available source of supply is also Sugarite Creek and the only water available to the City's system is that which has heretofore been appropriated and used by and belongs to the Raton Water Works Company. The City of Raton following the construction of its system took possession of a portion of these reservoirs and has taken and is taking for the supply of its customers the water appropriated by and owned by the Raton Water Works Company and thereby depriving the company of the water which belongs to it and preventing it from obtaining the water necessary for its proper use and the supplying of its customers.

All of said contract, easements, rights-of-way, water and water rights constitute a portion of the property conveyed to appellant as trustee and constitute a part of the security for the payment of the bonds of the Raton Water Works Company, and the interest thereon.

The only source of income from which the Raton Water Works Company could pay either the principal or interest on the bonds secured by the deed of trust consisted of the income and rentals received from customers and consumers of water under its system of water works. Appellant's bill points out that if the City of Raton is permitted without restraint to continue to do the acts above recited it will be impossible for said company to pay either the interest or principal of said bonds and that said acts have already resulted in the default on the payment of interest on said bonds since 1915. That by reason of these acts on the part of the City of Raton the assets and properties of the water company have greatly depreciated and if relief is not had will so greatly depreciate and lessen the value of these assets that they will be wholly inadequate to pay said bonds.

Appellant's bill further alleges that the acts so done and threatened have been and will be to the irreparable injury and damage of the appellant and those whom it represents; that it has no adequate remedy at law; that the relief to which it is entitled can only be granted by a Court of Equity; that by reason of said acts appellant's property has been and will be taken without due process of law and it has been and will be deprived of the equal protection of the law; that the obligations of the contract between said company and the State of New Mexico and that between the City of Raton and said Company and also that between said company and the Atchison, Topeka & Santa Fe Railroad Company will be impaired.

The bill prays that the defendant, the City of Raton, be perpetually enjoined from enforcing the provisions of Ordinance No. 197 in so far as the same requires or orders the removal of the mains and pipes of the Raton Water Works Company from

the streets and alleys of said city and that said ordinance be to that extent declared null and void. That defendant city be enjoined from tearing up and otherwise interfering with said company's mains, pipes, machinery and water system in the strets and alleys of the city of Raton, and from taking or continuing possession of the company's reservoirs and sources of water supply, and from interfering with or disturbing the water company in the use and enjoyment of its water rights. That the City of Raton be required to pay to appellant as trustee for the bondholders such sum as will compensate said bondholders for loss and injury already suffered through wrongful acts the continuance of which is sought to be prevented by injunction.

II

SPECIFICATION OF ERRORS

The assignment of errors contains seven paragraphs, all of which relate to the sustaining of the motion to dismiss the amended bill and the entry of judgment thereon. The motion to dismiss consisted of four paragraphs. The Court sustained the motion without mention of any particular portion thereof. It is, therefore, assumed that each paragraph was sustajned and error is separately assigned to the sustaining of each paragraph.

The errors of the lower court are stated in the assignment of errors, as follows:

"1. That the United States District Court for the District of New Mexico erred in sustaining the motion of the defendant, the City of Raton, to dismiss plaintiff's Amended Bill.

2. That the United States District Court for the District Court for the District of New Mexico erred in rendering and entering judgment in facor of the defendants and against the plaintiff in the above entitled suit.

3. That the United States District Court for the District of New Mexico erred in sustaining paragraph I. of defendants' motion to dismiss plaintiff's Amended Bill.

4. The United States District Court for the District of New Mexico erred in sustaining paragraph II. of defendants' motion to dismiss plaintiff's Amended Bill.

5. The United States District Court for the District of New Mexico erred in sustaining paragraph III. of defendants' motion to dismiss plaintiff's Amended Bill.

6. The United States District Court for the District of New Mexico erred in sustaining paragraph IV. of defendants' motion to dismiss plaintiff's Amended Bill.

7. That the United States District Court for the District of New Mexico erred in dismissing plaintiff's bill and in holding that it did not state a cause of action against the defendant The City of Raton."

Transcript of Record, page 29.

Further consideration and specification of these errors will be presented in the brief of the argument.

III.

BRIEF OF ARGUMENT

The several grounds of the motion to dismiss will be considered in the order in which they appear in the motion.

1.

Does the Amended Bill state a cause of action?

The subdivisions of defendants' motion numbered 1 and 2 ask the dismissal of the amended bill on the ground that it does not state a cause of action in equity and that it did not state facts sufficient to entitle plaintiff to equitable relief against the City of Raton.

Plaintiff is a trustee for bondholders and as such is not only entitled but obligated to institute and maintain an action to protect the trust property when threatened wih injury. Some of the authorities sustaining the right of a trustee to maintain an action, as here, will be presented at a later point in this brief.

The property held by the Trustee as security for the bondholders may roughly be classed as follows:

1. The contracts, easements, and franchises entitling the Water Company to the use of the streets of the City of Raton for the distribution of its water.

2. The reservoirs, water shed, water rights, and facilities for gathering water.

3. Pipes, mains and apparatus for distributing water to consumers.

4. Contracts with consumers, good will, income and those properties employed in the administration of business.

It is obvious that the destruction or taking away from the Water Company of any one of these four classes of property would be fatal to the life of its business. It could not operate in the city without a right in the streets. It could not begin business without water rights and reservoirs to give a right to water and a means of gathering it, and it would be vain to gather water

without pipes to distribute, while without income from its service to meet its expenses and pay its debts, it could not long exist as a going concern.

In 1905 when the Deed of Trust was executed the Raton Water Company had been, through the uninterrupted use of its various properties, serving the City of Raton and its inhabitants with water for many years. Those who bought the bonds of the Water Company had as their security all of these properties combined into a prosperous going concern. This continued until 1913 when the City of Raton conceived and put into execution a plan to destroy the Raton Water Works Company and take over the major portion of its properties and assets. The steps taken to this end are recited in the bill and summarized in the Statement of Facts. This plan sought either to destroy or convert to the use of the City practically all of the property of the Water Company. The water rights and reservoirs were taken and made use of without due process of law and without compensation. The right of the Company to use the streets was sought to be destroyed by an ordinance seeking to cancel these rights and the company was further ordered to remove its mains from the streets. These steps necessarily lead to the loss of all cutsomers and business, of all good will, of all income and to the destruction of practically the entire value of the plant and properties. This program carried to its ultimate conclusion would take away all the security from the bondholders and render the bonds valueless.

It is to prevent the consummation of this plan that the Trustee brought this suit.

So far as water rights, water shed, reservoirs, pipes, mains and other physical properties are concerned, no further description or specification is needed but it is necessary to a clear understanding of the situation that a fuller explanation be presented as to the contracts and franchises.

The Raton Water Works Company was incorporated under an Act of the General Assembly of the Territory of New Mexico passed February 24, 1887, being Chapter XII. of the Session Laws of the General Assembly of New Mexico for the year 1887.

By virtue of incorporation under that act and the provision of the articles of incorporation declaring that the company was formed for the purpose of supplying water to the Town of Raton and the inhabitants thereof, the company became vested with the right to lay its mains and pipes in any of the streets or alleys of Raton. This right is unlimited in time but is subject to such regulations as may be provided by the corporate authorities of the town.

Counsel for the City in the lower Court controverted this conclusion. We therefore will present the reasons for our con-

clusion with such brevity as is consistent with proper presentation.

The portions of the act pertinent to the point are:

"Section 1. Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith; for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the territory, or some person authorized by law to take the acknowledgement of conveyances of real estate and when so acknowledged, such articles shall be filed with such secretary.

"Sec. 2. Such articles shall set forth:

1. The full names of the incorporators, and the corporate name of such company.

2. The purpose or purposes for which such company is formed; and if the object be to construct reservoirs and canals, or ditches and pipe lines for any of the purposes herein specified; the beginning point and terminus of the main line of such canals and ditches and pipe lines; and the general course, direction and length thereof shall be stated.

3. The amount of the capital stock and the number of shares as definitely as practicable.

4. The term of existence of the company, which shall not exceed fifty years.

5. The number of directors, and the names of those who shall manage the business of the company for the first year.

6. The name of the city or town and county in which the principal place of business of the company is to be located." * * * *

"Sec. 21. Corporations formed under this act for the purpose of furnishing or supplying water for any of the purposes mentioned in section one, shall have the right and privilege of constructing their reservoirs, canals, pipe lines or ditches on or over any of the lands now belonging to this territory, or which may hereafter become the property of the territory, and the right to use any timber, stone or other

materials upon such lands, and along the line of such canals or ditches, or in the vicinity of such resevoirs as may be necessary in the construction thereof." * * * *

"Sec. 24. Corporations formed under this act for the purpose of suplying water to any city, town, or the inhabitants thereof, for any purpose, may lay their mains or pipes in, along, and upon any of the public streets or alleys of such city or town, subject to such regulations as may be provided by the corporate authorities of such city or town; and may furnish and supply such city or town or the inhabitants thereof, with water, upon such conditions and terms as may be fixed by such corporations, or as may be agreed to by the consumers and such corporations."
This act became effective February 24, 1887.

By an amendment of the bill a detailed compliance with the provisions of this Act in the incorporation of this company was pleaded (page 26, Transcript of Record).

New Mexico, in 1887, was a sparsely settled territory in a region where rainfall is generally inadequate to raise substantial crops and resort must be had to irrigation. The act in question was passed to stimulate irrigation and manufacturing, to encourage the settlement of the country and the building of towns and cities. To this end it was natural and proper that inducements should be offered to lead people to undertake enterprises which would promote the growth of the territory. Cities could not be built without a water supply. To induce the provision of water systems the legislature provided that a right to lay pipes and mains in the streets of a city or town should be given to the corporation organized to supply water to such town or city. The legislature while giving a franchise unlimited in duration, provide properly that the use of the franchise should be subject to regulation by the town or city. Section 21 of the Act confirms this view as there the legislature not only gave a right of way over all property of the territory for any corporation formed under the Act for the purpose of furnishing water for any of the purposes mentioned in Section One, which includes supplying water for "domestic and other public uses, including cities and towns", but also gave free use of such timber, stone and other materials upon such land as might be needed in construction work. The legislature thus in this act gave a right to lay and maintain pipes and mains in every place subject to its control, i. e., the property belonging to the territory and the streets of towns and cities over which it had control.

Prior to the passage of the law of February 24, 1887, quoted above, the law governing the construction and operation of water

works in cities and towns was the Act of April 1, 1884, the provisions of which so far as pertinent are as follows:

"Water, gas and electric light works—Construction—Construction commenced before incorporation.

Sixty-eights. Cities and towns shall have power to erect water works, or gas works, or authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, voting on the question at a general or special election, by vote approve the same. * * *"

"Water works and water supply beyond limits.

Sixty-ninth. Cities and towns shall have power to construct or authorize the construction of such water works, without their limits, and, for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes and drains, used in and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken, for five miles above the point from which it is taken, and to enact all ordinances and regulations necessary to carry the power herein conferred into effect.

"Water and gas—Time limit of franchise—Contracts for City supply—Rates.

Seventieth. When the right to build and operate such water and gas works is granted to private individuals or incorporated companies by said cities and towns, they may make such grants to inure for a term of not more than twenty-five years, and authorize such individuals or companies to charge and collect from each person supplied by them with water or gas, such water or gas rent as may be agreed upon between said persons or corporations so building said works and said city or town, and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes thereof, and for such other purposes as may be necessary for the health and safety thereof, and also with gas, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

New Mexico Statutes, Annotated, 1915.
pp. 1047 and 1048.

The City of Raton contends that this statute of 1884, controls the situation. The consideration of a few general and accepted principles and their application will make apparent the error of the City's contention.

The State has full control over the streets in a municipality and complete power to grant franchises therein. Dillon Municipal Corporation (5th Ed) Sec. 1222.

The City has no inherent power to grant franchises in its streets. It has only such powers in this respect as are granted expressly or by fair or necessary implication. McQuillan Municipal corporation, 1624; 28 Cyc. 866; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; Elizabeth v. Banks, 64 S. E. 189, 150 N. C. 407.

The City can only act in these matters as the agent of the State and within the scope of its delegated powers, and a grant or franchise by a City ordinance under delegation of power is a grant from the State. Dillon Municipal Corporation (5th Ed.) Sec. 1242; Boise Water Co. v. Boise City, 230 U. S. 84, 94.

A delegation of power to a City to grant a franchise does not impair or restrict the right of the State. Such delegation is not a surrender or repeal of the power of the State. The fact that a City is given the right to grant a franchise does not prevent the State from granting a similar or a different franchise.

> Newcastle v. Lake Erie Ry Co., 57 S. E. 416; 155 Ind. 18.

In line with these general principles it has been held that a statute granting rights of way to certain corporations is not repealed by a subsequent statute delegating to cities power to grant and regulate such franchises.

> City of Wichita v. Old Colony Trust Co., 132 Fed. 641.
> Michigan Tel. Co. v. City of Benton Harbor, 80 N. W. 386, 121 Mich. 512.
> Wis. Tel. Co. v. Oshkosh, 62 Wis. 32; 21 N. W. 828.
> N. W. Tel. Ex| v. City of Minneapolis, 86 N. W. 69; 81 Minn, 140.

It would follow from these principles and decisions that even if the Act granting cities power to grant franchises as in the 1884 Act had been subsequent to that of 1887 granting a right to lay pipes and mains in the streets, that the original statutory grant would not have been impaired.

But here the statutory grant is subsequent to the delegation to the City. Therefore if either act is repealed in whole or in part it is the earlier act. There is no possible rule of statutory construction by which the plain wording of the 1887 law could be

impaired or limited by the prior act of 1884. It is not material to our case whether these acts conflict or not as in case of conflict the 1884 statute must yield, but an examination of the statutes will show but slight, if any, conflict.

The foregoing, we believe, clearly shows that upon the incorporation of The Raton Water Works Company, under the 1887 Act and its compliance with the provisions thereof, it became vested with the right to lay and maintain its mains and pipes in the streets and alleys of Raton and that this right was not limited in time but that the laying thereof was subject to regulation by the municipal authorities. And further, that by this incorporation the company became vested with the right to supply the municipality and its inhabitants with water and that this right was without limit as to time and subject only to "such conditions and terms as may be fixed by such corporation or as may be agreed to by the consumers and such corporation."

Nor is such form of statutory grant of an unlimited franchise in the streets or a municipality an unusual or exceptional thing. Such statutory grants are made in many other states amongst which are Georgia, New Jersey, Pennsylvania, California, Kansas, Wisconsin, Michigan, Minnesota and Mississippi, as appear from the following cases and some heretofore cited:

Dorrance v. Bristol Borough, 73 Atl. 1015, 224 Pa. 464.
City of Atlanta v. Gate City Gas Co. 71 Ga. 106.
Atlantic City Water Co. v. Consumers Water Co., 15 Atl. 581; 44 N. J. 427.
Borough of Millvale v. Evergreen Ry., 18 Atl. 993; 131 Pa. 1.
In re Johnson 69 Pac. 973, 137 Cal. 115.
People v. Stephen, 62 Cal. 209.
Iowa Tel. Co. v. City of Keokuk, 226 Fed. 82.
Abbott v. Duluth, 104 Fed. 833.
Hodges v. Telegraph Co. 18 So. 84; 72 Miss. 910.
Wichita v. Old Colony T. Co., 132 Fed. 641, 645.

It will be also contended by the City that the acceptance of the provisions of Ordinance No. 10 of the City of Raton has estopped the Water Company to claim or rely upon the statutory grant.

The statute does not give an exclusive right. The statute provides that the laying of pipes may be regulated by the City and that the terms upon which water is supplied may be agreed upon. The law of 1884 gave the City power to enter into a contract for the furnishing to it of water.

All of these things were covered by Ordinance No. 10. The City in order to induce the company to give it an adequate water

supply contracted that for a period of 25 years it would not enter into competition with the Water Company,—an agreement it did not keep as it pointed out in the Bill. The Ordinance further provided regulations as to laying pipes and a schedule of rates for both City and private consumers. There is thus no inconsistency in accepting the added benefits and privileges of Ordinance No. 10 and in retaining the unlimited franchise upon which the company could rely and under which it could operate after the period of 25 years had expired and it was no longer entitled to the beneficial provisions of Ordinance No. 10. Such is also the holding of the courts: N. W. Tel. Co. v. Minneapolis, 86 N. W. 69; 72; 81 Minn. 140; Abbott v. Duluth, 104 Fed. 833; City of Wichita v. Old Colony Trust Co., 132 Fed. 641.

Ordinance No. 10 of the City of Raton provided that the rights thereby granted to the Water Company should continue until July 25, 1916. The Water Company (Folio 23) duly performed all of the terms and conditions of this Ordinance as well as of the Statute of 1887.

In addition the Raton Water Works Company had succeeded to all the rights and properties of The Raton Water Company, which company was organized in 1882 and had laid its pipes and mains in what are now the streets of the City before any town or City was incorporated. This company thus acquired easements and rights which antedate the rights of the City by eight years.

Therefore on August 15, 1915, when the City of Raton passed Ordinance No. 197, the Raton Water Works Company held a three-fold right to occupy the streets of the City with its water mains; first, the unlimited right granted by the statute of 1887; second, the rights derived from its predecessor, The Raton Water Company; and third, the right granted by Ordinance No. 10 of the City of Raton.

Notwithstanding this three-fold right, the City of Raton ordained by section 2 of Ordinance 197 (Folio 29), Transcript of Record page 20:

> "That said Raton Water Works Company be and it is hereby directed and required immediately to remove from the streets, alleys, lanes, roads and other highways and grounds and public places within the City of Raton its pipes, conduits, structures, and works of every kind and character, used or capable of being used in connection with its water works system in said city of Raton."

And by section 3 directed the officials of the City to take whatever steps might be necessary to effectuate the provisions of the Ordinance.

In addition the City took possession of a portion of the reservoirs of the Water Company and the City further took and applied for its use and that of its customers the water supply of the Water Company and has practically excluded the Water Company from the use of water from its former and only source of supply so that it could not obtain the water belonging to it and which it had used and had the right still to use for its proper uses.

The only source of income of The Raton Water Works Company was the rental received from its consumers. The acts of the City have so greatly impaired the income of the company that it has been unable to pay even the interest on its bonds. The denial of its rights in the streets and the taking of its water rights and other property has likewise greatly dessened the value of its property, and unless relief is obtained in this proceeding the properties of the company will be wholly inadequate to pay the company's bonds.

We believe the foregoing entirely sufficient to show that a cause of action was stated in the amended bill.

Two questions remain in considering this portion of defendants' motion: First, may the Trustee for the bondholders maintain the action? Second, does the Federal Court have jurisdiction?

That a trustee not only has the power but it is its duty to invoke the aid of a court of equity to protect the trust estate whenever the necessity arises is a principle well settled.

Mercantile Trust Co. v. Columbus, 203 U. S. 311.

Old Colony Trust Co. v. City of Wichita, 123 Fed. 762, 767.
Affirmed: 132 Fed. 641.

Guardian Trust Co. v. White Cliff Cement Co. 109 Fed. 527.

City & County of Denver, v. N. Y. Trust Co., 187 Fed. 890, 894.

City of Denver v. Mercantile Trust Co., 201 Fed. 790, 797.

Knickerbocker Trust Co. v. Kalamazoo, 182 Fed. 865, 868.

Phinizy et al. v. Augusta & K. R. Co., 56 Fed. 273, 277.

Is the cause of action within the jurisdiction of the Federal Court? Jurisdiction is not sought upon the basis of diversity of citizenship but upon the ground that Federal Constitutional rights are being infringed.

A grant of the right to use the streets either by direct legislative act or by an ordinance under the power delegated to a

city when accepted and acted upon by the grantee is a contract between the grantee and the State which is protected by the prohibition of the Federal Constitution against laws impairing the obligation of contracts.

> Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 9.
> Vicksburg v. Vicksburg Water Co., 202 U. S. 453.
> Vicksburg v. Vicksburg Water Co., 185 U. S. 65, 81.
> New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 660.
> Boise Water Co. v. Boise City, 230 U. S. 84, 90.
> Cleveland v. Cleveland City Ry. Co., 194 U. S. 517.
> Dillon Municipal Corporation, Sec. 1242, 1306.

In California the Constitution of 1879 granted to any company, duly incorporated to furnish water to any municipality which did not own a plant for such purpose, the right to use the streets, to lay pipes and conduits, to supply such municipality and its inhabitants with water. This provision was before this Court in Russell v. Sebastian, 233 U. S. 195, where it was said, at page 204:

> "That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 660; New Orleans Water Works Co. v. Rivers, 115 U. S. 674, 680, 681; Walla Walla v. Walla Walla Co., 172 U. S. 1, 9; Louisville v. Cumberland Telephone Co., 224 U. S. 649, 663, 664; Grand Trust Ry. Co. v. South Bend, 227 U. S. 544, 552; Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 65; Boise Water Co. v. Boise City, 230 U. S. 84, 90, 91. Dillon on Municipal Corporations, 5th Ed., Sec. 1242."

In the Mercantile Trust Company v. Columbus, 203 U. S. 311, at 320, the Court said:

> "That the ordinance of the common counsel of a municipal corporation may constitute a law within the meaning of the constittuional clause is too well settled to admit of doubt."

Therefore, Ordinance No. 197 of the City of Raton is a law impairing the obligation of the contract between the Raton Water Works Company and New Mexico and the bill clearly presents a question over which the Federal Court has jurisdic-

tion under Section 10 of Article I. of the United States Constitution. The cancellation of the Company's franchise and the destruction of its easements and valuable business rights is a taking of property without compensation and without due process of law in violation of the Fourteenth Amendment.

The Bill also alleges that the City is taking the water rights, reservoirs, and other property without compensation and without due process of law. These allegations present a situation giving Federal jurisdiction under the Fourteenth Amendment.

The Bill sets forth that the acts of the City in passing Ordinance No. 197 and ordering the Raton Water Works Company from the streets and doing other of the acts charged were for the purpose of securing for the water system of the City of Raton the exclusive opportunity to furnish water in the City by excluding the Raton Water Works Company. The situation is a far stronger one than in the case of Los Angeles vs. Los Angeles Gas Corp., 251 U. S. 32, where the Court held that there was "a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another," and said "and this the Fourteenth Amendment forbids."

The case of Mercantile Trust Co. v. Columbus, 203 U. S. 311, presents facts very similar indeed to the case at bar and is such a direct and clear adjudication that the Federal courts have jurisdiction under a state of facts such as is presented here, that further consideration of that point is needless.

Other cases upholding Federal jurisdiction in such cases are:

Walla Walla City vs. Walla Walla Water Co., 172 U. S. 1.
Vicksburg Water Works Company v. Vicksburg, 185 U. S. 65, 202 U. S. 453.
Davis & Co. v. Los Angeles, 189 U. S. 207.
Knoxville Water Co. v. Knoxville, 200 U. S. 22.

2.

In paragraph numbered 3 of Defendant's motion dismissal of the bill was asked on the ground that there was a nonjoinder of parties plaintiff in that the interests of The Raton Water Works Company are united with those of Plaintiff, and it should have been a party plaintiff.

The cases already cited definitely decide that a Trustee for bondholders may maintain an action to protect the trust property.

The Trustee's rights are independent of those of the mortgagor. The mortgager is not an indispensible party to the suit and a decree in another action to which the trustee was not a party is not res judicata against the Trustee even though the same issues were involved.

Old Colony Trust Co. v. Omaha, 230 U. S. 100 at 122.
Keokuk Co. v. Missouri, 152 U. S. 313.
Louisville Trust Co. v. Cincinnati, 76 Fed. 296.

In the case of Mercantile Trust Co. v. Columbus, 203 U. S. 311 cited above, in which the facts were quite similar to those here the same alignment of parties was made. The suit was brought by the Trustee for bondholders and against the City of Columbus and the Water Company was joined as a defendant.

3.

Paragraph numbered 4 asks dismissal on the ground that there is a misjoinder of parties defendant. That this part of the motion is not well taken is obvious from the authorities cited in the preceding portion of this brie.

4.

The paragraph of the motion numbered 5 asserts that there is a misjoinder of three independent causes of action. These causes of action are claimed to be (1) a cause of action for damages for breach of a contract between the defendant The City of Raton and the defendant Water Company; (2) a cause of action to enjoin the enforcement of Ordinance No. 197 of the City of Raton; and (3) an action to enjoin a trespass upon real property consisting of a reservoir and water rights belonging to the Water Company.

All of the rights which the trustee has are based upon a single instrument—the deed of trust conveying to it the properties of the Water Company to secure the bondholders. The suit of the trustee has but a single purpose which is to protect for the benefit of the bondholders the property conveyed to it for their security.

Moreover, while of several kinds all the different properties constitute necessary units of a single system. The reservoirs, pipes, water rights, franchises, contracts and income all constitute essential elements of the water system. The value of the entire system as a going concern is much greatr than the aggregate value of the several parts if separated and no longer operated as harmonious parts of the system.

All of the acts of which the trustee complains are acts which threaten the existence of the water system as a whole. If the security in the hands of the trustee is to be protected from impairment it is as essential that the franchises in the streets and the pipes and mains be protected as that the water rights and reservoirs be protected so that water is available for distribution.

The trustee asks that the City be ordered and decreed to pay the trustee such sum as will compensate the bondholders for loss occasioned by violation of the provisions of its contract with the City by which it agreed not to compete with the City prior to July 15, 1916. This is but asking the Court of Equity to do that which it always does—give complete relief. Certain acts are threatened which are in violation of plaintiff's rights and certain injury has already been done by these wrongful acts; the trustee asks that the City be enjoined from doing in the future the acts threatened and that the only relief possible, compensation, be given for the past injuries. These are not separate causes of action ,all the relief asked is in pursuance of a common purpose, the protection of the trust property. The acts of the City complained of are likewise all a part of a common plan to take or destroy the Water Company's property and to secure for itself a monopoly in the suplying of water in the City of Raton.

The presentation of all these matters in one bill is not only not in conflict with the requirements and purposes of equity practice but in strict harmony therewith.

The case of Brown v. Guarantee Trust Co., 128 U. S. 403 shows the position taken by this Court on the subject of multifariousness. A cross bill was attacked as multifarious. It was by a trustee under a mortgage asking foreclosure against a water company and also against Starr and Brown asking that a contract between them be specifically enforced. This contract covered the ground on which part of the water plant was built. The Court held that this cross bill was not multifarious but on the contrary "avoids multiplicity of suits without subjecting the defendants to inconvenience or unreasonable expense."

In the case of Elder v. Western Mining Company, 237 Fed. 966, at page 977, the Court gives a clear statement of the law:

> "No complaint is multifarious which presents a common point of litigation the decision of which will affect the whole subject-matter and will settle the rights of all the parties to the suit, and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient that each party has an interest in some material matters involved therein and they are connected with the others."

In Westinghouse Air Brake Co. v. K. C. L. Ry., 137 Fed., 26 at 31, the Circuit Court of Appeals discusses the principles and authorities bearing upon multifariousness and says:

> "The vice of multifariousness is the union of causes of action which, or of parties whose claims, it is either impractical or inconvenient to hear and adjudicate in a single suit.

> Where this vice does not exist, where it is as practical and convenient for the court and the parties to deal with the claims or causes of action presented, and the parties joined by a petition, in one suit as in many, the pleading is not multifarious, and it should be sustained."

In C. M. & St. P. Ry. Co. v. U. S. 218 Fed. 288, it was held that in a suit by the United States to enjoin the railway company from constructing or operating its road unless it filed a stipulation required by the Secretary of the Interior, may be included a demand for "damages for timber cut and destroyed and injury done in the course of the construction and operation of the railway."

This court affirmed this case in C. M. & St. P. Ry. v. U. S., 244 U. S. 353, and at page 359, said:

> "It is objected that the case is not one which is cognizable in a Court of Equity and that the bill is multifarious. Both branches of the objection are without merit so plainly that a discussion of them would serve no purpose."

In accord with this statement of the law are numerous cases among which may be noted:

> Rogers v. Penobscot Mining Co., 154 Fed. 606, 613.
> Gas Securities Co. v. Antero Res. Co. 259 Fed. 433.
> Jones v. Mo.-Edison Elec. Co., 144 Fed. 765, 780.

Under these authorities it seems clear that the paragraph of the motion based on multifariousness should have been overruled. Not only do the three portions of the complaint which the motion designate as independent causes of action, have a common point of litigation but they have the same source and foundation and the same purpose and would require to a large degree the same evidence to support. The relief in each instance is claimed by and against the same party. In fact, it is but the demand of three kinds of relief which are necessary to do full equity upon one cause of action.

5.

The paragraphs of the motion to dismiss designated II., III., and IV., respectively, assert that the separate causes of action alleged to exist by subdivisions (1), (2), and (3), of the paragraphs numbered 5 do not state facts sufficient to constitute a cause of action.

We have endeavored to point out that there is but one cause of action and that the facts set forth were sufficient to constitute a cause of acion. In presenting our views on these points heretofore we believe we have presented sufficient to show that para-

graphs II., III., and IV. of the motion should have been overruled.

Conclusion

In short the bill charges:

That the City of Raton by the passage of Ordinance No. 197 has endeavored to deprive The Raton Water Works Company of all the right to lay and maintain its pipes in the streets of Raton notwithstanding it held rights in such streets derived from the statute of New Mexico, from the ordinance of the City, and from its predecessor, The Raton Water Company.

That the City has violated its covenant not to build a competing plant within the period granted by Ordinance No. 10.

That the City has taken without compensation the reservoirs and water rights of the Water Company.

That the City now proposes to tear up and confiscate the pipes and mains of the Company's distributing system.

That all of this is done with the purpose of making it impossible for the Water Company to perform its contracts with its consumers in the City and The Santa Fe Railroad Company and to enable the City to take over the business of supplying these consumers and obtaining a monopoly for its system.

That these acts have already resulted in default in payment of interest on the Water Company bonds for several years and depreciation in the value of the plant and if relief is not given will result in the almost complete destruction of all value of the property to which the bondholders must look for payment.

That as all of these properties were conveyed to the Trustee to secure the bondholders of the Water Company it is not only the right but the duty of the Trustee to take steps to protect the trust property.

Therefore, we respectfully submit that the District Court of New Mexico was in error in sustaining the motion to dismiss and each part of it and that the decree should be reversed and the cause remanded for further proceedings.

Respectfuly submitted,

ALVA B. ADAMS,

ROBERT S. GAST,

Solicitors for

The Bankers Trust Company,

Appellant.

FILED
DEC 27 1921
WM. R. STANSBURY
CLERK

BRIEF OF APPELLEE THE CITY OF RATON

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. [redacted]167

THE BANKERS TRUST COMPANY, Appellant,

vs.

THE CITY OF RATON and THE RATON WATER WORKS COMPANY, Appellees.

Appeal from the District Court of the United States for the District of New Mexico.

JOHN H. FEY, Solicitor for appellee, THE CITY OF RATON.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 607

THE BANKERS TRUST COMPANY, Appellant,

vs.

THE CITY OF RATON and THE RATON WATER WORKS COMPANY, Appellees.

Appeal from the District Court of the United States for the District of New Mexico.

BRIEF OF APPELLEE, THE CITY OF RATON.

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BRIEF STATEMENT OF FACTS.

This brief is filed on behalf of the City of Raton. For convenience the appellant, The Bankers Trust Company, will be referred to as Trust Company. The appellee, City of Raton, will be referred to as the City, and the defendant, The Raton Water Works Company, will be referred to as the Water Works Company.

A brief history of this litigation is essential to a proper understanding of the issues. The suit was commenced by the filing of a complaint October 27th. 1915, in which complaint the Trust Company was plaintiff, and the City and Water Works Company were defendants. The appearance of the Water Works Company was entered on the same day the complaint was filed, but no pleading was filed by the Water Works Company at that, or at any other time, and it has never resisted in any manner the action by the Trust Company.

It was difficult to determine what cause of action the Trust Company was attempting to set forth in its original complaint. Taken as a whole, it appears that it was trying to set forth a cause of action for specific performance of an alleged obligation resting upon the city to purchase the water works system of the Water Works Company. A perusal of the original complaint, as it appears in the printed transcript, pages two to ten, shows that no mention was made in the original complaint of Ordinance No. 197 of the City, which was passed and adopted August 6, 1915. To this original complaint the City filed a motion to dismiss on November 15, 1915. The case remained in this condition until February 20, 1920, when such motion was argued. On February 24, 1920, the motion was sustained and the Trust Company given the privilege of filing an amended complaint. This amended complaint was filed March 15, 1920. On March 23, 1920 a motion was filed by the City to dismiss such amended complaint, which motion was argued June 8, 1920, and sustained June 10, 1920. Thereafter, the plaintiff was allowed to amend its amended complaint *nunc pro tunc* as of June 8, 1920. By the original complaint there was an attempt made to set forth a cause of action for the specific performance of an alleged obligation on the part of the city to purchase the water works system of the Water Works Company; somewhat similar to the cases of:

The City and County of Denver v. New York Trust Company, 229 U. S. 123, and

Raton Water Works Co. v. City of Raton 22 New Mex. 464.

The original complaint having been held not to state a good

cause of action upon this theory, the Trust Company entirely changed the nature of its cause of action in its amended complaint. By the amended complaint it is alleged generally that the Town of Raton was incorporated in the year 1890; that the Water Works Company was incorporated in the year 1891; that the Raton Water Company (not the Raton Water Works Company the defendant herein) was incorporated in 1882, and had furnished water to the Atchison, Topeka and Santa Fe Railroad Company, and other persons, prior to the incorporation of the Town of Raton and prior to the completion of a system of water works by the Water Works Company, after the incorporation of Raton up to about April 1892. On July 20, 1891, the Board of Trustees of the Town of Raton passed and adopted an ordinance known as "Ordinance No. 10, Granting Franchise to Raton Water Works Company to Erect and Maintain Water Works." This ordinance was submitted to the electors of the town for ratification or rejection, at an election held August 1, 1891, and was ratified at such election. Upon its ratification the said franchise was duly accepted by the Water Works Company. There are very few of the terms of this franchise set forth in any manner in the amended complaint. However, enough does appear to show that it was granted for a term of twenty-five years, from July 15, 1891; that by its terms the Water Works Company was to have its water works system complete by July 1, 1892. That after the acceptance of the franchise and prior to the completion of its system, the Water Works Company purchased the pipes of the Raton Water Company, and it is fair to presume that such pipes were purchased and made a part of the system The Water Works Company was then constructing. The purchase was made in April 1892, and the system was completed July 1, 1892, and at that time accepted as completed, according to the terms of the franchise, by the Town of Raton. In 1905, the Water Works Company executed a mortgage to secure payment of its bond issue of $300,000.00. This mortgage originally ran to the Manhattan Trust Company, to whose rights The Banker's Trust Company succeeded. In 1912 the city took steps to construct and erect a system of water works to be operated and maintained by the City. The first step was an election April 2, 1912, at which the proper qualified electors authorized the construction of such a system and authorized the issuance of bonds to the extent of $400,000.00 for that purpose. The next step was on July 16, 1913, when the City council passed an ordinance providing for the issuance of $300,000.00 in bonds and directed the construction of a plant. Immediately after the adoption of this ordinance the bonds were sold and the construction of the plant com-

menced. The plant was completed on or about July 1, 1915, ready for operation and as stated in the complaint, soon was furnishing practically all of the inhabitants of the City of Raton with water for domestic and other municipal purposes, and furnishing itself with water for fire protection. On August 6, 1915, the City Council adopted Ordinance No. 197, which, among other things, (as stated in the amended complaint) contained the following provisions:

"Now, therefore, be it ordained by the city council of the City of Raton:

Section 1. That the ordinance entitled 'Ordinance No. 10, Granting Franchise to the Raton Water Works Company, to Erect and Maintain Water Works,' passed July 20th, 1891, and published July 24th, 1891, as amended by Ordinance No. 104, and all ordinances amendatory thereof, be and hereby are repealed, and the franchise therein granted be and the same are hereby revoked, and all rights and privileges therein granted, or thereby permitted, are null.

Section 2. That said Raton Water Works Company be and it is hereby directed and required immediately to remove from the streets, alleys, lanes, roads and other highways and grounds and public places within the City of Raton its pipes, conduits, structures and works of every kind and character, used or capable of being used in connection with its water works system in said city of Raton.

Section 3. That the Mayor, Clerk and City Attorney of said city be and they are hereby authorized and directed to take all such steps as may be necessary on behalf of the City of Raton to effectuate the provisions of this ordinance.

Section 4. All ordinances, and parts of ordinances, in conflict with this ordinance are hereby repealed.

Section 5. This ordinance shall take effect and be in full force five days after its passage and publication.

Adopted and approved this 6th day of August, A. D. 1915.

J. J. SHULER,
Mayor."

In the amended complaint there are no facts set up sufficient to show the invalidity of Section 1 of said Ordinance No. 197. By Section 1, the rights granted by the Town of Raton under Ordinance No. 10 were revoked and annulled. It must be remembered that Ordinance No. 10, was a franchise to a water company. The natural presumption is that such franchise gave to the City power of revocation if the company failed to furnish good and wholesome water, and the presumption must

also be that when the City Council revoked said franchise it acted within the terms of that franchise. The action would be similar to that taken by the City of Columbus and approved by this court in the case of:

Columbus v. Mercantile Trust & Deposit Company, 218 U. S. 645.

As a matter of law, it was decided by the Federal District Court of the District of New Mexico, acting thru Judge Pope, in the case of Raton Water Works Company v. City of Raton, that the City did have such power. The opinion in that case was not published therefore, we attach hereto a copy of said opinion ,the order modifying the opinion and the final decree in that case as appendix "A". In the amended complaint in this case it was alleged in the last paragraph that at the time this suit was commenced there was pending in the United States Court a case between the Raton Water Works Company, as plaintiff, and the city of Raton, as defendant. That said cause had been concluded when the amended complaint was filed.

By reason of the plaintiff not making any attack upon Section 1 of Ordinance No. 197, it is fair to presume that the plaintiff in this case has accepted the decision of Judge Pope in the case of Raton Water Works v. City of Raton, as announcing the correct rule of law with respect to such section.

In the amended complaint attack is made upon Sections 2 and 3 of said Ordinance No. 197. By these sections, the Water Works Company was required to remove from the streets, alleys, lanes, roads and other highways and grounds, and public places within the city of Raton, its pipes, conduits, structures and works of every kind and character used or capable of being used in connection with its water works system in said city of Raton. As a matter of fact with respect to the injunctive relief claimed in this case, the effect of Section 1 of Ordinance No. 197, becomes immaterial because the franchise granted by Ordinance No. 10 expired July 15, 1916, almost four years prior to the filing of this amended complaint. The Trust Company now claims that notwithstanding the fact that the Water Works Company accepted the terms and provisions of Ordinance No. 10, which was adopted by the Board of Trustees of the Town of Raton, ratified by the qualified electors of such town, all in accordance with the laws then existing governing towns and cities, it is not bound by that provision which limited the term to twenty-five years, although it enjoyed the benefits of the provisions of such franchise at least until it was forfeited in August, 1915. The Trust Company bases this claim of right to use the streets for a water works system after the expiration of the franchise Ordinance No. 10 upon an alleged grant

from the Territorial Legislature of New Mexico. This claim of the Trust Company presents the main question in this case. Upon a satisfactory determination of that question all others become easy of solution. Therefore, we will take up in this brief as the first matter, this main question, which may be stated as follows:

II.

THE MAIN QUESTION: DOES THE WATER WORKS COMPANY HAVE THE RIGHT TO MAINTAIN ITS PIPES, CONDUITS, AND OTHER STRUCTURES USED IN CONNECTION WITH ITS WATER WORKS SYSTEM IN THE CITY OF RATON IN THE PUBLIC STREETS ALLEYS, LANES, ROADS AND OTHER HIGHWAYS AND GROUNDS AND PUBLIC PLACES WITHIN THE SAID CITY AFTER THE TERMINATION OF ITS FRANCHISE GRANTED TO IT BY ORDINANCE NO. 10 OF THE TOWN OF RATON?

ARGUMENT AND STATUTES.

Judge Pope in his decision in the case of Raton Water Works Company v. City of Raton, answered this question in the negative. Judge Pope's successor, Judge Neblett, who heard this case in the lower court, also answered the same question in the negative. The decisions of these two judges were correct.

In order to understand this question, it is necessary to consider portions of two laws of the Territorial Assembly of New Mexico. One is entitled: "An act to Incorporate Cities and Towns" Approved April 1, 1884. The other is entitled: "An act to Authorize the Formation of Companies for the Purpose of Constructing Irrigating and other Canals and the Colonization and Improvement of Lands" Approved February 24, 1887. Before taking up these laws ,it is of interest, if not of benefit, to consider the acts of Congress concerning the powers of Territorial Assemblies at the time the two laws were passed. When the act concerning the incorporation of cities and towns was passed there was in existence an act of Congress granting to Territorial Legislative Assemblies the right to pass general or special laws for incorporation of towns and cities, conferring upon such towns and cities corporate powers and privileges necessary to their local administration. This was Chapter 168 of the Act of June 8, 1878. Pursuant to this power, the Territorial Legislative Assembly of New Mexico, in 1884, adopted the first general law relative to the incorporation of cities

and towns. Prior to that time all cities and towns in New Mexico had been incorporated by special acts.

Agua Pura Company v. Mayor and Board of Aldermen, 10 New Mexico 6.

Prior to the act of the Territorial Legislative Assembly of New Mexico, approved February 24, 1887, Congress had adopted the act of July 30, 1886. This act, as far as applicable here, contained the following provisions:

> "The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not of issue), loan, trust and guarantee associations, and for the construction or operation of railroads, wagon-roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific associations."

(Which was an amendment of the old act of March 2, 1867 and did not change the law with respect to the kind of a company now under consideration).

and also

> "That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:.....laying out, opening, altering, and working roads or highways. Vacating roads, town-plate, streets, alleys and public grounds..... Regulating county and township affairs ..... Incorporating cities, towns, or villages, or changing or amending the charter of any town, city or village..... Granting to any corporation, association or individual any special or exclusive privilege, immunity, or franchise whatever....."

With this reference to the acts of Congress governing territorial legislative assemblies, we take up the consideration of the two acts of the Territorial Assembly of New Mexico above mentioned. From the dates of the passage of these acts it is apparent that the act of April 1, 1884, was passed pursuant to the authority contained in the act of Congress of June 8, 1878, and that after July 30, 1886, the Legislative Assembly of the Territory of New Mexico could not grant any special charter to any town or city; could not pass any special law changing or amending the charter of any town or village, and could not grant to

any corporation, association or individual any special or exclusive privilege, immunity or franchise whatsoever.

The act of the Territorial Legislative Assembly of New Mexico of April 1, 1884, is a general comprehensive law governing the incorporation and classification of towns and cities, and describing in great detail their powers, rights and privileges. In this connection it is only necessary to consider a few sections of said act. These Sections are as follows:

"SEC. 6. All avenues, streets, alleys, parks, and other places designated or described as for public use, on the map or plat of any city or town, or of any additional made to such city or town, shall be deemed to be public property and the fee thereof be vested in such city or town.

SEC. 12. Cities and towns organized as provided in this chapter shall be bodies politic and corporate, under such name and style as they may select at the time of their organization and may sue, or be sued, contract, or be contracted with, acquire and hold property, real and personal, have a common seal which they may change and alter at pleasure, and have such other privileges as are incident, to corporations of like character or degree, not inconsistent with the laws of the Territory.

SEC. 13. All municipal corporations organized under this act shall have the general powers and privileges, and be subjected to the rules and restrictions granted and provided in the sections of this act.

POWERS.

SEC. 14. The city council and board of trustees in towns shall have the following powers.

Sixth. To contract an indebtedness on behalf of the city, and upon the credit thereof by borrowing money or issuing the bonds of the city or town, for the following purposes, to-wit: For the purpose of erecting public buildings; for the purpose of constructing sewers for the city or town; for the purpose of the purchase or construction of water works for fire and domestic purposes; for the purpose of the construction or purchase of a canal or canals, or some suitable system for supplying water for irrigation in the city or town; for the purpose of the construction or purchase of gas works for manufacturing illuminating gas, or purchase illuminating gas and for the purpose of supplying a temporary deficiency in the revenue for defraying the current expenses of the city or town. The total amount of indebtedness for all purposes shall not at any time exceed five per centum of the total assessed valuation of the taxable property in the city or town.

Seventh—1—To lay out, establish, open, alter, widen, ex-

tend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, parks, and public grounds, and vacate the same and to direct and regulate the planting of ornamental and shade trees in such streets, avenues, and public grounds.

III To regulate the use of the same.

IV. To prevent and remove encroachments or obstructions upon the same.

VII To regulate the opening therein for the laying out of gas or water mains and pipes, and the building and repairing of sewers, tunnels, and drains, and erecting gas lights; PROVIDED, however, that any company heretofore organized, or which may be hereafter organized, for the purpose of manufacturing illuminating gas to supply cities or towns or the inhabitants thereof with the same, shall have the right by consent of the city council or town trustees, but not without such consent, (subject to existing rights,) to erect gas factories and lay down pipes in the streets or alleys of any city or town in the territory, subject to such regulations as any such city or town may by ordinance impose.

X. To provide for and regulate crosswalks, and curbs, and gutters.

XI. To regulate and prevent the use of streets, sidewalks and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse-troughs, posting hand bills, and advertisements.

XVIII. To license, regulate, and control the laying of railroad tracks; to provide for and change the location, grade, and crossing of any railroad, and to control, regulate, and prohibit the use of steam engines, and locomotives propelled by steam power within the corporate limits.

XIX. To require railroad companies to fence their respective railroads or any portion of the same, and to construct cattle guards at crossings of streets and public roads, and keep the same in repair within the limits of the corporation.

XX. To require railroad companies to keep flagmen at railroad crossings of streets, and provide protection against injury to persons and property in the use of such railroads.

XXI. To compel street railroads to raise or lower their railroad tracks to conform to any grade which may at any time be established by such city or town, and when such tracks run lengthwise of any street, alley, or highway, to keep their tracks on a level with the street surface, and so that such tracks may be crossed at any place on such street, alley, or highway.

Sixtieth. The City council or board of trustees shall have no power to grant the use of or the right to lay down any railroad track, in any street of the city or town, to any steam or

horse railroad company except upon the written consent of the owners of the land, representing more than one-half of the frontage of the street, or so much thereof as it is sought to be used for railroad purposes.

Sixty-Sixth. To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or towns, with such fines and penalties as the council or board of trustees shall deem proper; PROVIDED, no fine or penalty shall exceed three hundred ($300) dollars, and no imprisonment shall exceed ninety days for one offense.

Sixty-Seventh. They shall have power to erect water-works, or gas-works, or authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, voting on the question at a general or special election, by vote approve the same.

Sixty-eight. They shall have power to construct or authorize the construction of such water-works, without their limits, and for the purpose of maintaining and protecting the same from injury and the water from pollution; their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes, and drains, used in and necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken, for five miles above the point from which it is taken, and to enact all ordinances and regulations necessary to carry the power herein conferred into effect.

Sixty-ninth. When the right to build and operate such water and gas works is granted to private individuals or incorporated companies by said cities and towns, they may make such grants to inure for a term of not more than twenty-five years, and authorize such individuals or companies to charge and collect from each person supplied by them with water or gas, such water or gas rent as may be agreed upon between said persons or corporations so building said works and said city or town, and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes thereof, and for such other purposes as may be necessary for the health and safety thereof, and also with gas, and to pay therefor such sum or sums as may be agreed upon between said contracting parties.

Seventieth. Said cities or towns are hereby authorized to condemn and appropriate so much private property as shall be necessary for the construction and operation of said water-works or gas-works, in such manner as is or may be prescribed by law.

Seventy-third. They shall have the right and privilege of taking water in sufficient quantity, for the purpose hereinbefore mentioned, from any stream, gulch, or spring in the territory; PROVIDED, that if the taking of such water in such quantity shall materially interfere with or impair the vested right of any person, or persons, or corporations, heretofore acquired, residing upon such creek, gulch, or stream or doing any milling or manufacturing business thereon, they shall obtain the consent of such person, or persons, or corporation, or acquire the right of domain by condemnation, and make full compensation or satisfaction for all the damages thereby occasioned to such person, or persons, or corporation.

Seventy-fourth. When it shall be deemed necessary by any municipal corporation to enter upon or take private property for any of the above uses, the same shall be examined, appraised, and the damages thereon assessed, and the proceedings in connection therewith shall, in all respects, be the same as is now provided by law for the taking of private property for the use of railroads.

SEC. 71. The city council shall possess all the powers granted in this act, and other corporate powers of the city not herein or by some ordinance of the city council conferred on some officer of the city; they shall have the management and control of the finances, and all the property, real and personal, belonging to the corporation; .....

SEC. 73. The city council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances. .....".

The act of February 24, 1887, was undoubtedly passed pursuant to the authority contained in the act of Congress of July 30, 1886, and must have been passed in compliance with the restrictions of the acts of Congress of July 30, 1886. The material portions of the act of the Territorial Assembly of New Mexico, approved February 24, 1887, to be considered in this case are as follows:

"AN ACT to authorize the formation of companies for the purpose of constructing irrigating and other canals and the colonization and improvement of lands.

BE it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water for the purpose of irrigation, mining, manu-

facturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connecton therewith; for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the territory, or some person authorized by law to take the acknowledgement of conveyance of real estate, and when so acknowledged, such articles shall be filed with such secretary.

SEC. 2. Such articles shall set forth:

1. The full names of the incorporators, and the corporate name of such company.

2. The purpose or purposes for which such company is formed; and if the object be to construct reservoirs and canals, or ditches and pipe lines for any of the purposes herein specified; the beginning point and terminus of the main line of such canals and ditches and pipe lines; and the general course, direction and length thereof shall be stated.

3. The amount of the capital stock and the number of shares as definitely as practicable.

4. The term of existence of the company, which shall not exceed fifty years.

5. The number of directors, and the names of those who shall manage the business of the company for the first year.

6. The name of the city or town and county in which the principal place of business of the company is to be located.

SEC. 21. Corporations formed under this act for the purpose of furnishing or supplying water for any of the purposes mentioned in section one, shall have the right and privilege of constructing their reservoirs, canals, pipe lines or ditches on or over any of the lands now belonging to this territory, or which may hereafter become the property of the territory, and the right to use any timber, stone or other materials upon such lands, and along the line of such canals or ditches, or in the vicinity of such reservoirs as may be necessary in the construction thereof.

SEC. 24. Corporations formed under this act for the purpose of supplying water to any city, town, or the inhabitants thereof, for any purpose, may lay their mains or pipes in, along, and upon any of the public streets or alleys of such city or town, subject to such regulations as may be provided by the corporate authorities of such city or town; and may furnish and supply such city or town or the inhabitants thereof, with water, upon such conditions and terms as may be fixed by such corporations, or as may be agreed to by the consumers and such corporations."

In the act of February 24, 1887 there is no repealing clause

of any kind or nature, either specific or general. The claim of the Trust Company now is that the Territorial Assembly of New Mexico, by Section 24 of said Act, granted to corporations organized thereunder a perpetual property right in the public streets and alleys of a city or town for the purpose of laying their mains and pipes in, along, and upon any of such public streets or alleys of any city or town, without obtaining the consent or authority of such city or town, and that cities and towns did not after the adoption of this statute, have the right to exclude water companies from their public streets and alleys. This claim is made notwithstanding:

(a) The claimed grant is made "subject to such regulations as may be provided by the proper authorities of such city or town."

(b) That the Legislative Assembly of the Territory of New Mexico had by previous laws (which are not repealed by this law) granted,

1. The fee in the streets and alleys to towns and cities;

2. Had given power to the towns and cities to regulate and control the use of such streets;

3. Had granted to towns and cities the right to determine whether or not they should erect their own water-works system or authorize the erection of a water works system by others.

4. Had limited the authorities of towns and cities to make a grant to others for a term not to exceed twenty-five years and then only after such grant had been approved by the qualified electors of the town.

(c) That the furnishing of water for domestic and municipal purposes has always been considered a purely local business.

(d) That claimed legislative grants are always to be most strictly construed in favor of the public and against the claimant.

(e) That municipal authorities represent the state with respect to local matters and are governmental agencies of the state.

(f) That implied repeals are not favored and will never be upheld when two laws can be read and construed together.

The claim of the Trust Company on behalf of the Water Works Company must be based upon the three following propositions:

First: That Section 24 of the Act approved February 24, 1887, was in itself sufficient to grant to the Water Works Company property rights in the public streets and alleys of the Town of Raton without securing the consent or authority of the town for such use.

Second: That the Territorial Legislature by adopting Section 24 of the Act approved February 24, 1887 repealed Section 6, Subdivisions 6th, 7th, 66th, 67th, 68th, 69th, 70th, 73rd and 74th of Section 14 and Sections 71 and 73 of the Act approved April 1, 1884.

Third: That the Water Works Company by accepting the franchise contained in Ordinance No. 10, which was granted pursuant to Subdivisions 67th, 68th, and 69th of Section 14 of the law of April 1, 1884, did not become bound by the terms of such franchise and the provisions of the law under which it was granted.

We will take these propositions up in their order and show that none of them can be sustained.

1. *Were the provisions of Section 24 of the Act of February 24, 1887, sufficient to grant to the Water Works Company the rights now claimed for it by the Trust Company.?*

AUTHORITIES CITED AS SUPPORTING THE NEGATIVE.

The City relies upon the following authorities for a negative answer to such questions:

City of Pomona vs. Sunset T. & T. Co. 224 U. S. 330,
Owensboro vs. Cumberland T. & T. Co. 174 Fed. 739,
Owensboro vs. Cumberland T. & T. Co. 230 U. S. 58,
Fed. Gas & Fuel Co. vs. City of Columbus, 96 O. St. 530
Little Rock vs. Reinman, 155 S. W. 105,
City of Madison vs. So. Wisc. Ry. Co. 146, N. W. 492,
Andrews et al vs. National Foundry & Pipe Works, 61 Fed. 782,
Pawhuska vs. Pawhuska Oil etc, Co. 115 Pac. 353,
Fifth Ave. Coach Co. vs. New York, 194, N. Y. Rep. 19,
Fifth Ave. Coach Co. vs. New York, 221 U. S. 467,
Blair vs. Chicago, 201 U. S. 400,
State vs. Water Supply Co. of Albuquerque, 140 Pac. 1059,
Colorado Tel. Co. vs. Fields, (New Mex.) 110 Pac. 571.

DISCUSSION OF AND QUOTATIONS FROM AUTHORITIES.

The right claimed by the Trust Company on behalf of the Water Works Company in this case is very similar to the right claimed by the Sunset Telephone & Telegraph Company in the streets of Pomona California under Section 19, Article 11 of the Constitution of the State of California, as amended on October 10, 1911.

At the beginning we can make no better comment concerning the claim of the Trust Company in this case than this

court made of the claim under that constitutional provision in the case of

City of Pomona vs. Sunset Telephone & Telegraph Company, 224, U. S. 330.

and we quote from that decision as follows:

"The claim based upon the amendment to article 11, section 19, of the Constitution of the state, October 10, 1911, does not impress us. Before that date the article provided that in cities having no public works for artificial light etc. individuals or corporations of the state, duly authorized should have the privilege of using the streets, etc. for the purpose, upon the condition that the municipal government should have the right to regulate the charges. By the amendment 'any municipal corporation may establish and operate public works for . . . . telephone service,' either by construction or by purchase. It then goes on: 'Persons or corporations may establish and operate works for supplying the inhabitants with such service upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges therefore.' We agree with the appellants that the amendment seems intended as a step in the direction of municipal ownership or control. The words 'upon such conditions,' etc., are not to be confined to police powers, which are conferred by section 11 of the same article, but are of general import. If the municipal corporation did not see fit to establish the public works itself, it may let others do it; but its power to impose conditions excludes the notion that the Constitution alone is a grant to others of a right to occupy the streets without its consent."

We feel that the Trust Company would not make its contention if it fully understood the purport and effect of the following words: "Subject to such regulations as may be provided by the corporate authorities of such city or town" contained in Section 24 of the Act approved February 24, 1887. The word "regulation" imparts the power to control and is indeed a word of wider import than control or the power to consent to an easement of way. The term "regulations" or "to regulate" has often been before the courts and we will take up a few of the decisions in which it is construed.

The leading case:

Owensboro vs. Cumberland T. & T. Co. 174 Fed. 739,

The opinion in that case was written by Judge Lurton and construed the charter provision of the City of Owensboro which

gave to such city the power "to regulate the streets, alleys and sidewalks and all improvements and repairs thereof." This opinion by Judge Lurton has been referred to and approved in many decisions of this court and we quote from it in part, commencing on page 749. The direct question involved was the right and power of the city to permit the operation of a telephone company in its streets.

> "That power to permit the use of highways and streets for such purposes must reside somewhere is obvious. Primarily, it resides in the Legislature of each state, but, as is well known, is almost universally delegated to the municipality concerned. Reasons of convenience, as well as theories of local rule in strictly local matters, lead us to expect that the local government has the power to regulate the use of its own streets.. * * * * The charter under which Owensboro was governed in 1898 was a special act of the Kentucky Legislature enacted in 1882. * * * Among the purposes for which it is given legislative power is 'to regulate the streets, alleys and sidewalks and all improvements and repairs thereof,' etc. Unless this provision gave to the city the power to control its own streets by regulating the uses to which they might be put in the public interest, it was without any such power, * * * * but the use of a public street for the construction of poles to carry the wires of such a company is a use within the range of the purposes for which a street may be legitimately used, whether the fee be in the city or its interest be confined to an easement in the land for street purposes. * * * * What power is delegated by the express power to 'regulate' the streets and alleys of the city? Manifestly, something was meant by the power to 'regulate'. The word 'regulate' imports the power to control the use of the streets, and is indeed a word of wider import than 'control' or the power to 'consent' to an easement of way."

In Owensboro vs. Cumberland T. & T. Co., 230 U. S. 58 this court said:

> "The original source of power over both streets and highways is the state. But this power of control is generally delegated in some form to the municipalities and county authorities of the state. Thus, the county fiscal courts, by section 4306, Kentucky Statutes, are given 'general charge and supervision of the public roads,' etc. Concerning the power resulting from the grant by the state to control streets or public highways, the Kentucky court, in American Car & Foundry Co. vs. Johnson County, 147 Ky. 69, 71, 143 S. W. 773, said: 'The right to grant a franchise

presupposes and is based upon the right of the authority granting the franchise to control the property over which the franchise is granted or which is affected by it. For example, the fiscal court could grant a franchise authorizing the erection of poles along the highways of the county, as the fiscal court has control of the highways. And so municipal corporations may grant franchises to use the streets and public ways of a city.' Again in Jackson-Hazard Teleph. Co. v. Holliday, 143 Ky. 150, 136 S. W. 134, the court said: 'That the fiscal court, having, as it did under section 4306 of the Kentucky Statutes, the control and supervision of the public roads of the county, had authority before the enactment of section 4679 b of the Kentucky Statutes, to grant the company the right to erect its poles along this road, in the absence of a statute expressly giving the court such authority, is we think settled by the case of Cumberland Teleph, & Teleg. Co. v. Avritt, 120 Ky. 34,' 85 S. W. 204, 8 Ann. Cas. 955. Sec. 4679 b referred to, gives to telephone companies the right to place their poles along such roads, subject to regulation by the fiscal courts, but it does not deal with the streets of municipal corporations. The right of such companies to occupy the streets of villages and cities was, therefore, dependent upon the charter powers, express or implied, under which they were organized.

"Owensboro was granted a special charter in 1882, by which, among other things, it is given power 'to regulate the streets, alleys, and sidewalks, and all improvements and repairs thereof.' If the county fiscal courts had power to grant to such companies a franchise to place their poles and wires along the public roads of a county under the statute giving them 'general charge' and right to 'supervise' such roads, it logically follows, as stated in American Car & Foundry Co. v. Johnson County, supra, that the city of Owensboro, under the power 'to regulate' its streets and alleys, had ample authority to grant a franchise to the telephone company to place and maintain its poles and wires upon the streets.

"The character of the business of such companies was well known. Access with their lines to the houses of their customers in the city absolutely required the right to use the public streets, either longitudinally or to cross them. By such an exertion of its power to control and regulate the use of the streets it did not authorize a new public use. Such a use was a legitimate street use, and did not impose upon the owner of the fee in the street an additional bur-

den. Cumberland Teleph. & Teleg. Co. v. Avritt, supra. Neither was the city thereby stripped of its police power over the streets. Louisville City R. Co. v. Louisville, 8 Bush, 420. Nor did it undertake to grant an exclusive right. Express power to grant an exclusive street franchise has generally been held essential. Dill. Mun. Corp 5th ed. Sections 1215, 1218, 1234. The grant in this case was not exclusive, and we are not called upon to deal with that question, since the ordinance here involved expressly reserves the right to make similar grants to other companies.

"The great power of Congress over interstate commerce is wrapped up in the power to 'regulate' such commerce. The authority of the city of St. Louis to compel the Western Union Telegraph Company to pay a rental for the maintenance of its poles and wires upon the streets of the city grew out of a charter power to 'regulate' its streets and alleys. In this case (149 U. S. 465, 469, 37 L. Ed. 810, 813 Sup. Ct. Rep. 990) the court said:

" 'The word "regulate" is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11, 604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used.'

"In Owensboro v. Cumberland Teleph. & Teleg. Co. 99 C. C. A. 1, 174 Fed. 739, a case involving the regulation of the rates and charges of the present appellee, the power of the city of Owensboro under its charter power to 'regulate' was held by the circuit court of appeals of the sixth circuit to amply justify the grant here involved, though its duration was not involved or considered.

"That the power to 'regulate' embraces power to grant to such companies the right to place and maintain their poles upon the streets has been generally held. Pikes Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 1, C. C. A. 8th Circuit; Detroit Citizen's Co. v. Detroit, 26 L. R. A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628, 636, C. C. A. 6th Circuit. In the latter case it was held that a charter power to 'open, close, and widen streets, and to prescribe, control, and regulate the manner in which the highways, streets, and avenues shall be used and enjoyed,' was a power broad enough to permit the city to consent to the use of its streets for such purposes by any com-

company. To the same effect see Dill. Mun. Corp. 2d ed. section 575; Atchison Street R. Co. v. Missouri, P. R. Co. 31 Kan. 661, 3 Pac. 284; Southern Bell Teleph. & Teleg. Co. v. Mobile, 162 Fed, 523, 526; State ex rel. St. Louis Underground Service Co. v. Murphy, 134 Mo. 562. 34 L. R. A. 369, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132; Brown v. Duplessis, 14 La. Ann. 854; Chicago, B. & Q. R. Co. v. Quincy, 135 Ill. 489, 27 N. E. 232; New Castle v. Lake Erie & W. R. Co. 155 Ind. 18, 57 N. E. 516."

The word "regulation" was recently construed by the Supreme Court of the State of Ohio in the case of

Federal Gas & Fuel Co. v. The City of Columbus, 96 O. St. 530.

We quote from page 538 as follows:

"The gas company admits that had Section 3878, Revised Statutes, used the words 'subject to such terms and conditions as they (the council) prescribe' instead of 'subject to such regulation and restrictions as they (the council) prescribe' the franchise ordinance would be a valid contract and obligatory upon the company.

"It must be conceded of course that the grant of power by the general assembly to the municipal government, through its council, was 'to grant franchise to gas companies in its streets,' etc. Necessarily such grant of power must be in general terms, and such grant must be reasonably and liberally contrued so as to effect the purposes of the statute. The legislature might well have used the language 'terms and conditions' instead of 'regulation and restrictions.' If there be any substantial difference in latitude and longitude as to these terms, it would seem to be against the gas company rather than for it; for the language undoubtedly applies to a limitation upon the powers and rights of the franchise company."

The word "regulation" as used in statutes concerning the powers of towns and cities has been defined in other cases. We quote from City of Little Rock vs. Reinman, 155 S. W. 105 at page 106:

"The power to regulate gives authority to impose restrictions and restraints upon the trade or business regulated. 'Regulate' means 'to direct by rule or restriction, to subject to governing principles or laws.' Webster's Dictionary. In City of Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659, the court said: 'To regulate is to govern by or subject to, certain rules or restrictions. It implies a power of restriction and re-

straint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted.' Cronin v. Peoples, 82 N. Y. 318, 37 Am. Rep. 564.

"Judge Dillon says: 'To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint certainly within reasonable limits as to the manner of conducting a specific business, and also as to the building or erection in or upon which the business is to be conducted. By virtue of the power to regulate, it has been held that the city council may by ordinance prohibit the carrying on of a business within certain specified portions of the city. By virtue of a similar power, it has been held that it is within the authority of the common council reasonably to limit the manner by prohibiting one or more methods * * *' 2 Dillon on Municipal Corporations (5th Ed.) Section 665."

In the City of Madison v. Southern Wisconsin Ry Co. 146 N. W. 492 at 500, it is said:

"The term 'regulation' has often been said to be one of very broad import. Power in that regard extends to requiring changes in physical condition as well as manner of use. No court has taken a broader view in that than this court. C., M. & St. P. Ry. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118; Eastern Wis. P. & L. Co. v. Hackett, 135 Wis, 464, 474, 115 N. W. 376, 1136, 1139; Chi., M. & St. P. Ry. Co. v. Village of Fair Oaks, 140 Wis, 334, 122 N. W. 810. It includes the power to widen, alter and extend streets so as to provide for the public convenience. U. S. v. Harris, 26 Fed. Cas. 185, 193. Also to granting the use of part of a street, and the exclusive use, under some circumstances; City of St Louis v. Western U. T. Co., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810, and to authorizing or requiring physical changes. McWethy v. Aurora El. L. & P. Co., 202 Ill 218, 67 N. E. 9; State v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep 515. The power to regulate is so broad that it includes power to prohibit under some circumstances. Atty. Gen. v. City of Boston et al., 142 Mass. 200, 7 N. E. 722. The term being thus broad, does it not include power to prescribe a condition of use such as to repave? In Fielders v. North Jersey St. R. Co., 68 N. J. Law 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552; the question was whether the general police authority of a city to regulate the use of its streets included power to require a street railway company to repave with-

in the zone of its tracks in case of that being necessary. The nine members of the court, by one majority, decided in the negative, the affirmative being maintained in a very vigorous dissenting opinion. As I read the opinions I cannot doubt that if the court had been dealing with an express condition in this case, having the appearance of being a substitute for one in a previous franchise on the subject of paving, the decision would have been unanimous in favor of the idea here maintained.

"To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted.' City of Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659. The principle thus applied is familiar. It is this: In case of a municipal power of regulation, either of a general nature over a particular subject or of a particular nature, as here, where it is a condition of the grant and the power exists for the conservation of public safety, convenience and welfare, any ordinance under it which is reasonable and in compliance with its purpose, is lawful.

"Many more illustrations of the comprehensive meaning of the word 'regulate' in situations somewhat similar to that in hand might be mentioned. Probably no better illustration could be given than to point to the history of the subject found in the many decisions of the federal courts on the power of regulation of interstate commerce. They have gone so far that it is very difficult to suggest limitations and the decisions are so familiar that citations seem unnecessary. As to the general scope, City of St Louis v. Western U. T. Co., supra, is sufficient. The court there said of the word 'regulate': It 'is one of broad import. It is the word used in the federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to use the streets 'as in the ordinance' it simply regulates the use which it prescribes the terms and conditions upon which they shall be used.' That has been many times referred to in the federal and other courts and significantly in Baltimore v. Baltimore Trust Co. 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160, where the court added: 'This power of regulation is a continuing power; it is not exhausted by being once exercised, and so long

as the object is plainly one of regulation, the power may be exercised as often as and whenever the council may think proper; the use of the street may be subject to one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously.'

"It is interesting to observe how the ordinary meaning of the term under consideration has been broadened in judicial conception by the manner of its use. In City of Owensboro v. Cumberland T. & T. Co., 174 Fed. 739, 750, 99 C. C. A. 1, 12, it was said: 'What power is delegated by the express power to "regulate" the streets and alleys of a city? Manifestly something was meant by the power to "regulate". The word "regulate" imports power to control the use of the streets, and is indeed a power of wider import than "control" or the power to "consent" to an easement of way."

The case of Andrews et al vs. National Foundry & Pipe Works, (C. C. A. 7,) 61 Fed. 782, has a very definite application to the question now under consideration. In the order of the lower court granting a temporary injunction, set forth in the statement of facts, among other things it is said:

"By Chapter 125, laws 1879, the common council of every city is authorized to permit subject to such rules and regulations as may be imposed, the laying of pipes in the streets of the city, and their maintenance and use, for the purpose of conveying water or steam under the surface of the streets * * * In the chapter entitled 'Organization of Corporations' (Rev. St. Wis. c. 86), under which the Oconto Water Company confessedly had being, it is enacted that 'any corporation formed for the purpose of constructing and operating water-works in any city or village of this state may * * * * by the consent of and in the manner agreed upon with the proper authority of such city or village use any street, alley, lane, park or public grounds for the laying of water pipes therein * * The city is therefore only authorized to permit the laying of pipes in the streets and their maintenance and use. That is not a grant of power to bestow a franchise but permission to suffer an easement. The law of its incorporation confers upon the Oconto Water Company its franchise (1) to own and operate the water-works; and (2) to use the streets of the city. The former power is without condition; the latter is subject to the assent of the municipality. The practical efficacy of the franchise may depend upon the discretionary act of the

city. The franchise is not, however, derived from that discretion but from the will of the legislature. The law authorizes the city to assent to the exercise of a power granted by the statute. The grant of power to the water company, as to the use of the streets, becomes operative only upon the happening of that contingency of municipal assent that is not a grant of power to a city to confer a franchise * * * * The use of its streets in here and are a part of the law of incorporation of the defendant water company. None the less, however, are its franchises derived from the legislature and not from the municipality."

The decision of the lower court was reversed by the Circuit Court of Appeals, Judge Woods writing the opinion, in the course of which it is said:

"While 'it is essential to the character of a franchise,' as was held in Bank v. Earle, 13 Pet. 595, 'That it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state', and while the right to the use of the public streets of the city by a gas company or water company for the purpose of laying down its pipes, is generally considered to be such a franchise, it is well settled that the legislature of a state may confer the power to grant such franchises upon municipal corporations; though, when so granted, they are nevertheless to be regarded as derived from the state. The question here, therefore, is not whether the franchises of the Oconto Water Company were obtained from the state; they necessarily came, directly or indirectly, from that source. It is whether or not the common council of Oconto had been given the power to grant such franchises and in this instance did grant those named in its ordinance. * * * * * By its act of incorporation the Oconto Water Company came into being endowed not with the right to operate and establish waterworks in Oconto, but with capacity to receive and exercise that right or privilege upon such terms as the city should consent to grant. But, though capable of receiving, it could acquire no complete or effective right or franchise without the consent, and there is no impropriety, legal or verbal, in saying without the grant, of the city."

The decision of the Supreme Court of Oklahoma in the case of

Mayor and Councilmen of City of Pawhuska v. Pawhuska Oil & Gas Co. et al, 115 Pac. 353,

construes an act of the legislature of the state of Oklahoma similar to Section 24 of the New Mexico Territorial Act ap-

proved February 24, 1887, as not being sufficient to grant a franchise in and of itself. We quote from the decision commencing at page 354:

"Section 12, art. 2, c. 26, pp. 435, 436 Sess. Laws 1909, provided: 'Every domestic gas pipe line corporation in this state is hereby given authority to build, construct and maintain gas pipe lines, over, under, across or through all highways, bridges streets or alleys in this state, or any public place therein under the supervision of the inspector of oil and gas well and pipe lines as to where and how in said highways, bridges, streets, alleys and public places said pipe lines should be laid, subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted, and subject to responsibility as otherwise provided by law. Provided, however, that whenever any gas line crosses the land or premises of any one outside of a municipality, said corporation shall upon the request of the owner of said premises connect said premises with a pipe line and furnish gas to said consumer at the same rate as charged in the nearest city or town.' The title of said act is as follows: 'An act to regulate the use and preservation of oil and gas and providing penalties for the violation thereof, providing for an inspector, his duties, compensation and appropriation therefor and declaring an emergency.'

"An act is to be construed in the light of its title and context. Considering the title and the several sections of said act, it may be fairly concluded that the Legislature did not contemplate or thereby attempt to grant every domestic gas pipe line corporation a franchise over the streets, alleys, and public places of any and every town or city in this state; but that said act was passed in the exercise of the police power of the state to restrict the maintaining of gas pipe lines to domestic corporations, and said section 12 intended that any domestic gas corporation first having procured a franchise under the provisions of article 18 of the Constitution, had authority to build, construct, and maintain gas pipe lines, over, under, across, or through all streets or alleys in such city or town, for the purpose not of maintaining gas pipe lines solely, but also of maintaining in such municipality a gas plant and furnishing gas to its inhabitants, such gas pipes to be laid in such streets or alleys in such city or town, for the purpose not of maintaining gas pipe lines solely, but also of maintaining in such municipality a gas plant and furnishing gas to its inhabitants, such gas pipes to be laid in such streets or

alleys under the supervision of the inspector of oil and gas wells and pipe lines; it being specifically provided that such line in such city or town should be subject to the control of the local municipality as to how the business of distribution therein should be conducted. To construe section 12 as contended for by the plaintiff in error would be tantamount to holding that it was a grant of a perpetual blanket franchise to every domestic pipe line corporation, as to every town or city of the state. Without determining whether the authority to grant franchises as to cities and towns is exclusively lodged in the the municipalities, or may be exercised also by the Legislature, it not being clear that it was the intention of the Legislature by said section to grant such a blanket franchise, and under the rule that as to every party claiming a special privilege or exemption the burden of establishing the same rests upon such party, and a strict construction obtaining against said party (Oklahoma City v. Shields, 22 Okl. 265, 100 Pac. 559), we hold that the defendant in error, by virtue of said section 12, has not, without more, a franchise to lay, use, and maintain gas pipes and mains, with all necessary and proper attachments and connections and appurtenances, upon and below the surface of the streets, alleys, sidewalks, etc., of the city of Pawhuska, for the purpose of maintaining a system of gasworks in said city, to sell and supply gas to it and its inhabitants.

As appears from the law of April 1, 1884 of the Territory of New Mexico, the fee of the streets was vested by such law in the towns and cities. Speaking of the rights of a city which owns the fee of its streets, the Court of Appeals of the State of New York in the case of

Fifth Ave. Coach Co. vs. City of New York, 194 N. Y. R. 19, at 28, said:

"That the defendant owns in fee the streets and avenues over which the plaintiff runs its stages is not disputed. Such streets are held in trust for public uses. In Osborne v. Auburn Telephone Company (189 N. Y. 393, 397) this court says: 'Cities which own the fee in the streets may contract, lease or grant their use for public or municipal purposes not inconsistent with nor prejudicial to the public easement or use for street purposes. In such cases the fee having been transferred to the municipality, it can grant rights in the streets other than for street purposes which do not impair the public easement.' The converse of such statement is true, and a city which owns the fee of its

streets can refrain from granting rights therein that are not for street purposes."

This decision of the New York Court of Appeals was affirmed by the Supreme Court of the United States in

Fifth Ave Coach Co. vs. City of New York, 221 U. S. 467,

The case of Blair vs. Chicago 201 U. S. 400 was a case involving the construction of legislative acts claimed to grant a franchise in the streets without the consent of the municipal authorities. The opinion in the case is rather lengthy. One section of the statute apparently required the consent of the municipal authorities before a street railway company could operate in the streets or extend their operations or continue under an old franchise.

It was claimed by the street railway company that a later section of this act gave it a franchise for a period of 99 years from the date of the act, without the consent of the municipal authorities. The governor of the state of Illinois had vetoed this bill because that was his construction of the act. The bill was passed over his veto and in a dispute between the city and the receiver of the railway company the matter came ultimately before this court. While the language of the act was somewhat different from the language of the Territorial Act of New Mexico under which the Trust Company makes its claim on behalf of the Water Works Company, still there are many statements in the opinion applicable to the case now before the court. We quote portions of the opinion, as follows:

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"By section 10 of the act the North Chicago City Railway Company was incorporated. In this act consistent with the theory that the full franchise of occupying and using the streets, without regard to authority from the city, except in designating streets, was vested by the State in the companies incorporated? This act conferred upon the railway companies, it is true, the right to use and occupy the streets of the city, but this right was upon the terms prescribed in the law. Conceding the plenary power of the legislature over the subject at that time, and that franchises, broadly speaking, are rights and privileges conferred by the State, and are derived from a grant of the sovereign power, nevertheless the State while exercising its authority might give to the city such measure of right and control in the matter as it saw fit. Dillon on Munic. Corps, 3d ed., section 705; Railroad Co. v. Richmond, 96 U. S. 521. The city is the corporate body directly interested in the use and control of the streets. By the charter of 1851 exclu-

sive control over the streets was given to the council. That it was the intention of the legislature to give effect to the right of municipal control in the act under consideration is shown in its confirmation of terms already fixed by contract between the city and the companies. As to the future, companies were to have no right to the use and occupancy of the streets until they should obtain from the city council authority to that end, under contracts to be agreed upon as to terms and conditions."
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"The act under consideration nowhere assumes to fix the duration of the grant, nor excludes the conclusion that it is embraced in the terms and conditions which are to be fixed by contract with the city. If the franchise to use the streets, without regard to municipal action, was fully conferred by the legislative act under consideration, then the company had only to take possession of the streets, subject to regulations as to running of cars, etc., by the city council. On the contrary, under the terms of this act, the city, by withholding its consent, could prevent the use of the streets by the corporations. No way is pointed out by which this consent could be compelled against the will of the council. That body might, for reasons sufficient to itself, under the terms of this act, by withholding assent, determine that it was undersirable to have the corporations in control of the use of the streets."
Page 460

"What, then, was conferred in the franchise granted by the State? It was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon. The franchise conferred by the State is of no practical value until supplemented by the consent and authority of the council of the city."
Page 462:

"We find no intention evidenced in legislative action thus far to prevent the municipal authorities from exercising the important and far-reaching authority of fixing by contract with the persons or corporations to whom franchises are granted by the State the term during which the occupancy shall continue. This feature of the right to use the streets, it need hardly be said, is of most vital importance to both parties. Some latitude of time is essential to the value and stability of the investment to be made. An unduly long period might conclude municipal action when

changing conditions and growing population demand it in the public interest."

Beginning on page 471:

"It may be that the very ambiguity of the act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. Pierce on Railroads, 491; New Oreleans & c Railroad Co. v. City of New Oreleans, 34 La. Ann. 429, 447. 'Words of equivocal import,' said Mr. Chief Justice Black, in Pennsylvania Railroad Company v. Canal Commissioners, 21 Pa. St. 9m 22,' are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature.' 'The just presumption,' says Cooley in his work on Constitutional Limitations, 7th ed. p. 565, 'in every such case is that the State has granted in express terms all that it designed to grant at all;' and, after quoting from the Supreme Court of Pennsylvania to the same effect, the learned author observes: 'This is sound doctrine, and should be vigilantly observed and enforced.'

"Since the decision of the Dartmouth College Case, 4 Wheat. 518, this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the State or municipalities acting under state authority. Concurrent with this principle and to be considered when construing an alleged grant of this character is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, an to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often-cited case of Charles River Bridge v. Warren Bridge, 11 Pet, 420, and has been uniformily applied in many subsequent cases in this court. In Perrine v. Chesapeake & Delaware Canal Company, 9 How. 172, 192, the same eminent Chief Justice,

speaking for the court, said: 'The rule of construction in cases of this description . . . is this,—that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained or unusual construction , contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded.' In the case of The Binghamton Bridge, 3 Wall. 51, 75, it was said: 'The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.'

"This principle has been declared axiomatic as a doctrine of this court, Fertilizing Company v. Hyde Park, 97 U. S. 659, 666. In Slidell v. Grandjean, Ill U. S. 412, 438, it is declared a wise doctrine, 'it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' Among other cases affirming the principle in this court is Coosaw Mining Company v. South Carolina, 144 U. S. 550, in which it was applied in adopting, of two doubtful constructions, the one more favorable to the state. Many of the cases are cited in a note to Knoxville Water Company v. Knoxville, decided at this term, 200 U. S. 22, 34. Applying the principle so frequently asserted and uniformly maintained, we think it cannot be successfully maintained that the act of 1865 contains a clear expression of legislative intention to extend the franchise of these companies to use the streets of Chicago, without reference to the assent of the city, for the long term of ninety-nine years ,and for that time preventing other and different legislation restricting this grant of a practically exclusive right. So enormous a grant of privileges, including an exclusion from some streets of any railway system, ought not to be presumed or held to be conferred in doubtful and ambiguous words. Grants of this character are not to be destroyed by an unreasonable or narrow interpretation. But if ambiguity is fatal to such

claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are here asserted, fail when they can only be maintained by strained construction in their favor."
Beginning on page 487:

"As we understand the decisions of the Supreme Court of Illinois, the power to control the streets and highways by the township trustees, given by the act of March 5, 1867, would include the right to authorize their use for street railway purposes. In Chicago Municipal Gas Light Co. v. The Town of Lake, 130 Illinois, 42, 54, the court held: 'The power to control and regulate the streets, alleys and other public places within the limits of the town of Lake, and abate any obstructions, encroachments or nuisances thereon, was given, in its charter, to the corporate authorities of the town. Under this power the town could lawfully permit any use of such streets and alleys that is consistent with the public objects for which they are held ,and could make a grant of a right of way for the purpose of laying gas pipes and mains under the surface.' In People v. Blocki, 203 Illinois, 363, 368, the same court said, having reference to a grant of the right to lay switch tracks in the streets: 'The street, at the time said permits were granted, was under the control of the board of trustees of the town of Lake, and under the power conferred upon that municipality by law it was authorized to allow the use of said street for any purpose not incompatible with the purpose for which it was established, and to allow a railroad track to be laid therein was not a use incompatible with the purpose for which it was established.' In City of Quincy v. Bull, 106 Illinois, 337, on page 349 it was said: 'In this State there is vested in municipal corporations a fee simple title to the streets. Under the power of exclusive control over streets, it is very well settled by decisions of this court that the municipal authorities may do anything with, or allow any use of, streets which is not incompatible with the ends for which streets are established, and that it is a legitimate use of a street to allow a railroad track to be laid down in it. Moses v. Pittsburg, Ft. Wayne & Chicago Railroad Co., 21 Illinois, 515; Murphy v. City of Chicago, 29 Illinois, 279; Chicago & Northwestern Railway Co. v. People ex rel., 91 Illinois, 251.' In view of these Illinois decisions, construing the legislative acts of the State, we think the learned Circuit Court erred in holding that the trustees of the town of Lake had no power to grant the railway the use of the streets for street railway purposes."

In general we call the attention of the court to the statements in this case concerning the rule to be applied where a party claims a grant of a property right in public property direct from a legislative assembly. The rules laid down in *Blair vs Chicago* as shown by the above quotations have been repeatedly applied by this court. The same rules have been applied by courts of last resort in the various states and particularly in the Territory and State of New Mexico.

State vs Water Supply Co. of Albuquerque, 140 *Pac.* 1059 *at* 1062,

Colorado Telephone Co. vs. Fileds, 110 *Pac.* 571,

ARGUMENT BASED ON AUTHORITIES.

The claim of the Trust Company on behalf of the Water Works Company is based solely upon Section 24 of the Act approved February 24, 1887. The following words in that section, to-wit: "Subject to such regulations as may be provided by the corporate authorities of such city or town" must be given some meaning. As pointed out above, the word "regulations" is a word of very broad import, meaning more than "control" and more than "consent." It must also be remembered that a water works system is a matter of purely local concern, the municipal authorities having more direct interest in the water supply than in any other public utility. Nothing so affects the health of the public as a water supply. Throughout the country, therefore, the local authorities are given almost unlimited power with respect to a water supply for a town or city. In the very nature of the business it is and should be a monopoly. If under the construction placed upon this law by the Trust Company, the Water Works Company could lay its mains and pipes in the City without the consent of municipal authority, any other company organized under the same law could do the same thing, and the only limitation upon the number of pipes which could be laid in a street would be the physical ability of the street to carry or contain any more pipes.

Certainly the word "regulations" as used in this statute meant something more than mere police regulations or regulations as to damages and indemnity for damages or any such matters. It certainly meant full control over the subject, including the time when the pipes might be maintained in the city, the quality of the water to be furnished and all other matters which might affect the health and prosperity of the town or city.

This statute can be properly construed by saying that the act of incorporation thereunder endowed such corporations not with the right to establish and operate water works in towns and cities, but with capacity to receive and exercise that right

or privilege upon such terms as the town or city should consent to grant under its power of regulation. A similar statute was so construed in the case of Andrews vs. National Foundry & Pipe Company, 61 Fed. 782 at 788. By giving this statute this construction we have a fair constructon which meets every necessity of the case. A company could incorporate under this statute. When so incorporated it would have the capacity to receive a grant from a town or city. Before building its works it would apply to the town or city for such a grant and a determination of the regulations under which it was to operate if it entered the town or city.

Having received from the town this grant and having had the regulations prescribed and fixed, then the water works company could enter the town thereunder, knowing definitely what its rights and obligations were. That is just exactly what the Water Works Company did in this case. The Town was incorporated in 1890. The Water Works Company was incorporated in 1891. Before entering the Town it did apply to the Town for a franchise. This franchise was granted and acceped by the Water Works Company. One of the regulations fixed by the Town in this ordinance and accepted by the Water Works Company was that the grant should not exceed the term of twenty-five years and it is fair to presume was subject to forfeiture prior to that time upon failure of the Water Works Company to furnish good and wholesome water.

Whatever may be said concerning a proper definition of the word "regulations," here was a regulation imposed by the Town and accepted by the Water Works Company. The term "regulation" as defined in the cases which we have cited, is broad enough to include this limitation and restriction upon the period during which the right might be exercised by the Water Works Company. This limitation upon the time is a regulation which is based upon sound public policy and has been approved in many cases. Not only was this regulation one which the town had power to make under Section 24 of the law of 1887 and which the Water Works Company accepted by accepting this franchise, but also it was a limitation which the town was compelled to make under the law of 1884. This leads us to the next proposition and that is:

2. *Did the Territorial Legislature of New Mexico, by adopting Section* 24 *of the Act approved February* 24, 1887 *repeal Section* 6, *Subdivisions* 6*th*, 7*th*, 66*th*, 67*th*, 68*th*, 69*th*, 70*th*, 73*rd, and* 74*th of Section* 14 *and Sections* 71 *and* 73 *of the Act approved April* 1, 1884?

ARGUMENT.

When we consider these two acts, it must be borne in mind that when the legislature enacted the statute entitled, "An act to incorporate cities and towns" approved April 1, 1884 it was legislating directly with the subject of towns and cities. An examination of this act shows that it contains full and complete provisions concerning the organization and government of towns and cities. The statute is full and complete. Subdivisions 67th, 68th, 69th and 70th of Section 14 are similar to the laws adopted in nearly all western states concerning a water works system for towns and cities, that is it invests the town or city with the power to erect works to supply water for itself or to grant that right to others, but when the right is granted to others the town or city must impose certain restrictions and limitations.

The grant under this statute could not be made without being approved by the qualified electors of the town or city and this is a usual provision. When the right was granted to others it should not run for a term to exceed twenty-five years, thus leaving it in the control of the town or city to extend the time at the end of the first period granted or to exclude that company and grant the right to another or exclude that company and erect and build its own system. Bearing in mind that a water supply is a matter of purely local concern and of the utmost concern to the inhabitants of a town or city, it is but natural to assume that the legislature did invest almost unlimited power in the town or city with respect to this subject the town or city acting either through its elected officials or directly by its qualified electors.

The legislature then having fully covered the subject of the government of towns and cities, can it be presumed that the same legislature less than three years later, in enacting an act entitled "An Act to authorize the formation of companies for the purpose of constructing irrigating and other canals and the colonization and improvement of lands" intended to repeal any of the provisions previously enacted concerning towns and cities, in the absence of any expression to that effect? The statute concerning towns and cities was a general law, comprehensive and purporting to cover the entire subject. The law of 1887 concerning the incorporation of certain companies was a general law providing for the method of incorporation. Among its other provisions will be found a definition of the powers which such a company might under proper circumstances exercise. One of its powers was to take private property, but it could not take such property without the consent of the owner, except by the exercise of the power of eminent domain and pay-

ing full compensation for the property so taken.

It was given the power to take water from the public streams but again this power was limited so that it could not interfere with the rights of others already acquired. The legislature did grant to such companies the right to occupy lands owned by the Territory. This right was given by Section 21 and the language in that section where it is clear the legislature was granting a property right, is far different from the language in Section 24, where it is apparent that the legislature was defining a power which under certain conditions companies organized under the act might exercise.

AUTHORITIES DISCUSSED AND QUOTED.

Implied repeals are not favored. This rule is so well known that it is unnecessary to cite authorities. We will, however, call attention to some general statements contained in 25 Ruling Case Law, first at page 918:

> "Repeals by implicaton are not favored and will not be indulged, if there is any other reasonable construction. * * * The presumption is always against the intention to repeal where express terms are not used * * * * Nor can one act be allowed to defeat another if by a fair and reasonable construction the two can be made to stand together. Although two acts are seemingly contradictory or repugnant, they are, if possible by a fair and reasonable interpretation, to be given such a construction that both may have effect. If a later act not repugnant to the earlier and containing no negative words is not clearly intended to cover the whole ground of the earlier, there is no implied repeal."

And again on page 922:

> "To effect an implied repeal of one statute by another, they must both relate to the same subject and have the same object or purpose. Where there is a difference in the whole purview of the two statutes apparently relating to the same subject, the former is not repealed."

At page 1027 it is said:

> "A statute will not be so construed as to work public mischief, unless required by clear, unequivocal words, especially if the statute be chiefly to subserve individual interest. * * * * When a statute * * would divest the public of rights and violate a principle of public policy and would make provisions contrary to the policy which the government has indicated by many acts of previous legislation—in such case the statute ought not to be construed to impair the settled prerogatives of the government."

Illustrating these rules with respect to municipalities we

call attention to the case of *State vs. Milwaukee Elec. Ry. & Light Co.*, 172 *N. W.* 230 *at page* 233, where it is said:

> "Whatever the power of the Legislature may be in respect to granting a franchise upon the streets or cities for the extension of street railway lines where public convenience and necessity require it, in the absence of a clearly expressed legislative intent to that effect, it will not be assumed that the Legislature intended to withdraw from municipalities powers so delegated to them."

The Act of February 24, 1887 did not contain any repealing clause and particularly did not purport to repeal any of the statutes governing towns and cities. Taking the law of 1884 we find that the Territorial Legislature had vested fee in the streets in towns and cities. It had given the town or city authorities power to regulate the use of the streets and had also given town and city authorities control of the streets. Thus the fee, the regulation of the use and the control of the streets had all been vested by the Territorial Legislature in town and city authorities. These town and city authorities were the agents of the state in this respect. It is true the legislature might have taken away what it had given, but it is not presumed that it did take them away for the purpose of conferring that right or any part of it upon private individuals for private gain and nothing but the most explicit language would be sufficient to take from the control of the government represented by the municipal authorities, the fee, the regulation of the use and the control of the streets and vest it in a private corporation for private gain.

Where a city has the fee of the streets, the right to regulate the use of the same and the control over them, it has power to grant franchises to public utilities.

Blair vs. Chicago, supra, Owensboro vs. Cumberland Tel. & Tel. Co supra.

and other case heretofore cited in this brief.

ARGUMENT CONTINUED.

The Territorial Legislature of New Mexico did not stop with merely giving to towns and cities the fee, the right to regulate the use and the control of its streets, but it specifically provided concerning the matter of a supply of water for domestic and municipal purposes. Those provisions are contained in subdivisions 67th, 68th, 69th, 70th, 71st, 72nd, 73rd and 74th of Section 14 of the Act of 1884. Under these provisions the municipalities were given full power over the subject of a water supply. Such municipalities had the right either to erect or authorize the erection of such works by others. The authorities could neither erect or authorize the erection unless such

erection or authorization was approved by the qualified electors of the town. If the authorities were authorized to erect a system of water supply for the Town, they were endowed with the power to contract an indebtedness for that purpose, to take private property by eminent domain proceedings, to acquire water rights and even to take water from a stream when prior appropriations had exhausted the supply. In the latter case they must of course exercise the power under eminent domain and just compensation. They also were given the power to police the source of supply outside of the boundaries of the town so as to prevent pollution of the water supply.

On the other hand, if the authority was granted to others to erect a water works for the town the town authorities had the right to make contracts with such companies or individuals for the furnishing of the town or city with water for fire purposes and such other purposes as may be necessary for the health and safety of the community and the right to agree with such companies as to the charges to be made for furnishing water, but even when the town authorities were authorized by the qualified electors to authorize others to erect a water works system for furnishing water to the the town and city the grant of such right was to inure for a period not exceeding twenty-five years.

Can it be possible that the legislature of the Territory of New Mexico, after working out all the details of this law relative to towns and cities, intended to strike down all of this work, taking away from the municipal authorities this control and vest in a private corporation for private gain the right to go in and occupy the public streets and alleys of a town with its pipes and mains without the consent of the municipal authorities and without the power of municipal authorities to regulate and control such use of the streets even to the length of time that such companies might occupy them? Certainly the language contained in Section 24 of the law of 1887 was not sufficient for that purpose, but on the contrary it recognized the power and authority that had theretofore been vested in the municipalities and simply provided a means by which persons might incorporate a company having the capacity to lay pipes and mains in the public steets and alleys of a town, which capacity, however, could not be exercised until the town or city had fixed the terms and conditions upon which such capacity might be exercised. Terms and conditions are certainly included in the word "regulations" and under those terms and conditions which the town not only had power to fix, but which it was its absolute duty to fix, was the one that the grant should inure for a term not exceeding twenty-five years.

Under all the rules of law applicable thereto it cannot be said that the Territorial Legislature of New Mexico by adopting Section 24 of this Act to authorize the formation of companies for the purpose of constructing irrigating and other canals and the colonization and improvement of lands, approved February 24, 1887, took from towns and cities the powers which it had theretofore granted by the Act of 1884.

The contention of the Trust Company cannot be sustained unless Section 24 of the Act of 1887 did repeal the provisions of the Act of 1884, to which reference has been made. To hold that the Territorial Legislature intended to repeal these provisions of the law of 1884 would necessitate a holding that the legislature intended to revert from the policy it had adopted with respect to towns and cities and intended to take away from towns and cities the absolute control of this vital public necessity, the supplying of its inhabitants and itself with water for domestic and other municipal purposes a purpose which at all times has been recognized as a purely local concern. The furnishing of water to the inhabitants of a town or city has always been considered a matter of most vital importance and one which above all others should be controlled by the municipality whether furnished by the municipality or by a private company.

The trend of modern thought has been towards municipal control and no law, unless its terms of absolute necessity so require, should ever be construed as taking from the local authorities the control of this vital necessity. That such control is necessary is illustrated by the recent case in this court of Columbus vs. Mercantile Trust & Deposit Co., 218 U. S. 645 and is also illustrated by the opinion of Judge Pope in the case of the Raton Water Works Company vs. Raton, which opinion is appended hereto.

It must be remembered also that this Franchise Ordinance No. 10 was adopted and accepted by the Water Works Company in 1891; that the rights of the Trust Company and its predecessor and the bondholders which it represents did not accrue until 1905. The most that can be said of the rights of the Trust Company is that it succeeded or may under certain conditions succeed to the rights of the Water Works Company. It took its mortgage with full knowledge of Ordinance No. 10 and the law under which it was passed. When Ordinance No. 10 was adopted the parties to that ordinance, namely the town of Raton and the Water Works Company placed their construction upon these laws and Ordinance No. 10 was passed, adopted, ratified, confirmed in accordance with the provisions of the law of 1884 and as so passed, adopted, ratified and confirmed was accepted

by the Water Works Company and by such action a practical construction was placed upon the validity of these laws by the parties to Ordinance No. 10 at the time it was adopted and accepted.

3. *Was the Water Works Company by accepting the franchise contained in Ordinance No.* 10 *which was granted pursuant to Subdivisions* 67*th,* 68*th and* 69*th of Section* 14 *of the law of April* 1, 1884, *bound by the terms of such franchise and the provisions of the law under which it was granted?*

ARGUMENT.

At the time this Franchise Ordinance No. 10 was granted the parties thereto knew of the existence of the laws of 1887. They also knew the terms an provisions of the law of 1884. The very method by which Ordinance No. 10 was passed, adopted, ratified and confirmed by the Town of Raton and accepted by the Water Works Company shows that the parties at that time recognized that the law of 1884 was in full force and effect and that they were acting pursuant to the terms thereof. If the law of 1884 was not in force and effect then the Town of Raton had no power to make the franchise contract contained in Ordinance No. 10, but whatever may have been the fact, the parties recognized it as being in full force and effect and acted in accorance therewith.

The Water Works Company enjoyed the benefits of this franchise contract ordinance No. 10 from the time of its inception at least until the time it was revoked on August 6, 1915, and the presumption is that if it had fulfilled the terms of that Franchise Ordinance it would have enjoyed the rights thereunder until the expiration of its term by its own limitation which would have occurred on July 15, 1916. Under such conditions the parties are estopped to deny the validity of the law under which they acted.

AUTHORITIES CITED AND DISCUSSED.

Even if the law had been unconstitutional, still the parties would have been in the same position.

Daniels vs. Tearney, 102, *U. S.* 415.

If in the making of a contract or in the course of dealing the title of one party or the other to the property involved in the transaction is recognized and the deal proceeds upon that basis, both parties are estopped to deny that title or to assert anything in derogation of it.

16 Cyc., 802, and cases cited.

The Idlewild, 59 Fed., 628, affirmed, 64 Fed. 603,

Seymour vs. Slide Spur Gold Mines, 153 U. S. 523

Maltman vs. Chicago, Mil. St. Paul R. R. Co., 72 Ill. Apps., 378

Bedenbaugh vs. Southern R. R. Co. 48 S. E. 53; 69 S. Car. 1.

Fox vs. Windes, 127 Mo. 502; 30 S. W. 323,

City of Cleveland vs. Cleveland Elec. R. R. Co. 194 U. S. 517,

City of Cleveland vs. Cleveland Elec. R. R. Co 201 U. S. 529,

City of Cleveland vs. Cleveland Elec. R. R. Co. 204 U. S. 116.

The last three cases taken together show that where a city or town has power to make a contract (and the Town of Raton did have the power under Section 3564, Sub. 68 and 70, N. M. Ann. Stats.), and passes an ordinance granting a franchise, and such ordinance is accepted by the grantee, it constitutes a contract, binding upon both parties, and all the terms and conditions thereof must be observed.

The grantee in an instrument containing a power of revocation upon condition broken cannot deny the validity of the instrument or the capacity of the grantor to make it after condition broken.

Cowell vs. Colorado Springs Company, 100 U. S., 55 at 61

One party to an agreement, who have by virtue of it obtained property and the benefit of moneys expended thereon by the other party cannot be heard to allege that the agreement was against the policy of the law without offering to return the property.

Joy vs. St. Louis, 138 U. S. 1.

A party cannot be permitted to claim under and against the same deed.

Gibson vs. Lyon, 115 U. S.,440,

Those who accept the terms of a law and act under it are bound by its burdens.

Grand Rapids & Ind. R. R. Co. vs. Osborn, 193 U. S., 17

The water works company having accepted the franchise from the city is bound by its terms.

City of Columbia vs. Amer. Gas Co., 149 Pac., 402

Des Moines Water Co. vs. City of Des Moines, 206 Fed., 657 (C. C. A., 8th Cir).

City and County of Denver vs. New York Trust Co., 229 U. S., 123.

Detroit United R. R. Co. vs. Detroit, 229 U. S., 39

Louisville Trust Co. vs. Cincinnati, 76 Fed., 296 Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234

Scott County Road Co. vs. Hines, 215 U. S. 336,

Turnpike Co. vs. Illinois, 96 U. S., 63

State ex rel, de Burg vs. Water Supply Company, 140 Pac., 1059 (N. M.)

Pacific R. R. Co. vs. Leavenworth, 18 Fed. Cases No. 10649.

Thus in this case we have the Town of Raton and the Water Works Company dealing, concerning this vital subject matter, upon the supposition that the Town had the power to grant a franchise to the Water Works company and further that such power was being exercised under the law of 1884 which defined the rights of the Town and the restrictions imposed upon it by such law. The provisions of the law became a part of the terms of the franchise.

City and County of Denver vs. New York Trust Co. 229 U. S. 123,

ARGUMENT CONTINUED.

When the Water Works Company mortgaged its property in 1905 this franchise from the town was included as a part of the property so mortgaged. Thus all of the parties to this litigation are bound by the interpretation placed upon the laws by the Water Works Company and the Town of Raton at the time the Franchise Ordinance No. 10 was passed, adopted, ratified, confirmed and accepted. After having enjoyed the benefits of the rights granted by that franchise, the Trust Company on behalf of the Water Works Company now claims that it can ignore this practical interpretation, the rights and advantages secured by the Water Works Company, cast them to one side and say that under Section 24 of the law of 1887 the Water Works Company had the right to go into the streets without such a franchise and having gone into the streets under the franchise it can now stay in such streets perpetually without such franchise. Such a proposition has never been upheld by any court at any time.

Thus we have shown that the law of 1887 did not grant the rights which the Trust Company now claims on behalf of the Water Works Company; that the law of 1887 did not repeal any of the provisions of the law of 1884, that the Water Works Company and the Trust Company are bound by the acts of the Water Works Company in accepting Ordinance No. 10 under the law of 1884; in other words, that the Water Works Company's rights in the streets, alleys and public places of the City of Raton ended with the termination of the Franchise Ordinance No. 10, which was the holding of Judge Pope in the case of Raton Water Works Company vs. City of Raton, and of Judge Neblett in this case.

AUTHORITIES CITED BY APPELLANT UPON THE MAIN QUESTION DISTINGUISHED.

The Trust Company has cited some few authorities which it claims support its contention. The only comment necessary upon those authorities are brief quotations from them or of the law under which the right was claimed. With such quotations it will appear conclusively that in not one of such cases was any such law involved as Section 24 of the law of 1887. We will now take up these cases in the order in which they appear in appellant's brief.

Jersey City Gas Co. vs. Dwight, 29 *N. J. Eq.* 242

The case was not a case between a city and a public utility seeking to use the streets of the city without the consent of the city. The law under which the gas company was organized is not set forth in the opinion, but is briefly summarized. After outlining the manner of incorporation the opinion states, on page 244:

> "By the seventeenth section, power is conferred upon a corporation thus created to lay conductors in the public streets and grounds of the town or city in which it is located for the transmission of gas, provided it first obtains the written consent of the municipal authorities."

Elizabeth City vs. Banks, 64 *S. E.* 189,

The case is not in point upon any proposition in the case at bar. There was no conflict between the city and one claiming a grant direct from the legslature. There is some language in the case to the effect that without authority from the legislature a city could not grant a franchise, but we have heretofore pointed out many provisions of the law of 1884 which authorized the Town of Raton to grant a franchise, particularly with respect to the operation of a Water Works System, under the various powers conferred upon towns and cities by such act.

Boise Artesian H. & C. Water Co., vs. Boise City 230, *U. S.* 84,

The case does not involve any conflict between a city and a corporation claiming a grant direct from the state. The Water Company's rights were based on a contract with the city, the terms of which contract were contained in an ordinance of the city. The power of the city to make the contract was based upon its power to provide its inhabitants and itself with water.

Town of New Castle vs. Lake Erie etc R. Co. 155 *Ind.* 18

The case is one of a steam railroad which more than thirty years before the bringing of the action had constructed a railroad longitudinally along the side of a street of the town and had maintained it ever since its construction without objection.

The court held that while the state might grant such a right without the consent of the municipality, still the legislature had not done so and that railroads could not be laid longitudinally along streets without the consent of the municipal authorities; that the right to give or withhold such consent arose under the power of the municipality to regulate the use of its streets. In the opinion it was held that consent for the construction of this particular railroad track would be presumed because of the lapse of more than twenty years since its construction.

City of Wichita vs. Old Colony Trust Co. 132 *Fed.* 641.

This was a case involving the right of a telephone company to occupy the streets of the City of Wichita. It had occupied such streets long prior to the controversy which arose in this case. It had entered the streets under certain provisions of the act of the legislature of Kansas. These provisions are found in the opinion at page 645, as follows:

> "In 1868 (Gen. St. 1868, c 23) the Legislature of Kansas passed a statute dealing with the subject of corporations for the construction and maintenance of telegraph lines, which contains this provision:
>
> 'Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, wires and other fixtures along and across any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of such roads, streets and waters. * * *
>
> In 1885 (Laws 1885, p. 151, c. 104 p. 2) an act was passed authorizing the formation of telephone companies. It defined their powers as follows:
>
> 'All such corporations shall have all the rights and powers conferred, and be subject to all the liabilities and duties imposed by the general laws of this state upon telegraph corporations.'"

Even in that case and under the provisions of the statutes quoted, Justice Van Devanter dissented.

Mich. Tel. Co. vs. City of Benton Harbor, 80 N. W. 386.

The case was one involving a telephone company's right to maintain wires and poles in the streets of Benton Harbor and was based upon the following statutory provisions:

Page 387,

> "Section 4 of the act (Acts 1883, p. 131) providing for telephone and messenger service companies, reads as follows: 'Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets and high-

ways, and across or under any of the waters in this state, with all necessary erections and fixtures therefore; provided, that the same shall not injuriously interfere with other public uses of the said places, streets and highways, and the navigation of said waters; to construct, provide and furnish instruments, devices and facilities for use in the transmission of such messages, and to construct, maintain and operate telephone exchanges and stations, and generally to conduct and carry on the business of providing and supervising communication by telephone, and also the business of furnishing message service in cities and towns.' "

It will be noted that this statute, like all other statutes of this class of cases says nothing about city or town regulations or consent. Upon this feature the opinion in this case says:

Page 388

"It will be observed that the act under which complainant is organized does not require the consent of the municipality to the construction of its lines. The reason of this is apparent. The business carried on by these corporations is not local, but extends over and outside the state. Where the business is purely local, the legislature, in authorizing the formation of these corporations, usually provides that it must be with the consent of the municipality. Such is the requirement in the case of tramways. 1 How. Ann. St. Section 3527. So of street railways. Id. Section 3548. So of water companies Id. Section 3115. So of electric light companies. Id. Section 4191."

Wisconsin Tel. Co. vs. City of Oshkosh, 21 *N. W.* 828

Another telephone case in which it was held that a telephone company was a telegraph company. Page 829-830 states as follows:

"Such corporation, 'to build and operate telegraph lines, or conduct the business of telegraphing,' is especially authorized to 'conduct and maintain such lines, with all necessary appurtenances, from point to point upon or along or across any public road, highway, or bridge, or any stream or body of water, or upon the land of any owner consenting thereto, and from time to time extend the same at pleasure; and may connect and operate its lines with the lines of any person, company or corporation without this state; and charge reasonable tolls for the transmission and delivery of messages. But no such telegraph, line, or any appurtenance thereto, shall at any time obstruct or incommode the public use of any road, highway, bridge, stream, or body of water.' Section 1778."

The telephone company in addition to the power received from the state also had secured the consent of the city.

Page 831

"It appears in the record before us that the poles and posts of the plaintiff in the streets and public alleys of the city, and the wires upon them, had been put there and operated to June, 1883, by the permission, consent, and approval of the defendant, under what was known as the Athearn ordinance. The common council had the power to pass that ordinance 'for the benefit of the trade and commerce, of the city. Section 4, sub c. 6. c. 123, Laws 1877; section 3, subsc, 6, c, 183, Laws 1883, of course the city had no power to authorize any permanent obstruction or interference with the free passage of travel upon the streets and public alleys. Hume v. Mayor, 74 N. Y. 264; Cohen v. Mayor, 33 Hun. 404; S. C. 30 Alb. Law J. 443. Such obstruction or interference was expressly prohibited by the statute quoted. That ordinance did not attempt to give such authority, but the contrary. All the poles and posts seem to have been set, and the wires suspended, in accordance with the permission given in the ordinance. The plaintiff succeeded to the property and rights owned and enjoyed by Ahearn under that ordinance. Thus it appears that the plaintiff occupied certain portions of the streets and public alleys of the city to June, 1883, not only by express grant of the legislature, but by the express permission of the city authorities.

The telephone company was required to pay a state license fee in lieu of all taxes except taxes upon certain specific property. The city attempted to charge the telephone company a license fee by an ordinance adopted after the telephone company had erected its poles and wires in the city and without any statutory provision existing for the city exacting such a license fee. This ordinance was the matter before the court for determination and it was held that such ordinance requiring the license fee was void.

N. W. Tel. Exch. Co. vs. City of Minneapolis, 86 *N. W.* 69,

The rights in this case were based upon a statute reading as follows:

"In 1860 the following statutory provision applicable to telegraph companies was enacted: 'Any telegraph company incorporated or organized under the laws of this state, shall have full power and right to use the public roads and highways of this state, on the line of their route, for the purpose of erecting poles or posts on or along the

same, to sustain the wires or other fixtures: provided, however that the same shall be located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads or highways'. This section was incorporated into the revision of 1866, where it continued without change until 1881, when this statute was amended by inserting after the word 'telegraph' the words 'or telephone.' Chapter 73, Gen. Laws 1881 (secton 2641, Gen. St. 1894). In passing, it may be well to say that this court has never recognized any difference in character between telephone and telegraph companies. 'The transmission of intelligence by telegraph or telephone, is a business of a public character, to be conducted under public control, in the same manner as the transportation of persons or property by common carrier.' Cater v. Exchange So., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310."

Dorrance et al vs. Bristol Borough et al 73 Atl. 1015

In the opinion in this case the law under which the water company laid its pipes is not quoted. In the opinion it is said:'

Page 1017:

"The Bristol Water Company was incorporated August 21, 1874, under the general corporation act (Act April 29, 1874 (P. L. 73) of that year for the purpose of supplying water within the borough of Bristol. It completed the construction of its plant between February and April, 1875, furnishing water to the Pennsylvania Railroad Company in February of that year, and for domestic purposes in the following April. The court found:' It (the water company) claimed the right to construct its works and lay its pipes in the borough without the consent of the authorities thereof, and constructed and laid the same without such consent. The borough had nothing whatever to do in the matter of consentng or dissenting. The water company acted entirely independently of it.' "

Page 1018:

"The water company was chartered under the act of 1874, and it had the authority to enter upon the streets of Bristol borough and lay its mains and construct its plant without permission of the borough. In fact, this is the very thing it did. It made no contract with the borough and sought no permission of it to construct its plant. The company was not organized or created under or in pursuance of any arrangement or contract with the borough for the purpose of supplying the municipality with water."

The question involved was not the right of the water company to maintain its pipes, but the right of the borough to

build a plant to compete with the water company, which the court held the borough could do.

City of Atlanta et al vs. The Gate City Gas Light Co. 71 *Ga.* 106.

Page 108:

"The Gate City Gas Light Company brought suit on the equity side of the court against the City of Atlanta, the Mayor of said city, and its engineer, and alleged by its bill that it was incorporated by an act of the general assembly of Georgia, approved the 4th of February, 1875; that in addition to the powers conferred on such corporations, of having and using a common seal, etc., full power and authority was granted it to make, manufacture and sell gas, to be made of coal, rosin, or other materials, for lighting the streets, public and private buildings, and other places in the city of Atlanta, and 'to lay down in any and all of the streets, lanes, avenues, alleys, squares and public grounds of said city, gas pipes, and other apparatus for conducting gas through the same, and to erect therein such gas posts, burners and reflectors as may be necessary or convenient,' 'only provided that the public thoroughfares shall at no time be unnecessarily interrupted or impeded by the laying down or erection thereof, and that said streets, lanes, avenues, squares and public grounds shall not be thereby injured, but shall be left in as good state and condition as they were before the laying down of said pipes, conductors, or other apparatus, and the erection of said posts."

Page 111:

"By their charter said mayor and general council have power to open, lay out, widen, straighten, or otherwise change street, fix a system of grading and draining the same, to require streets and sidewalks paved, and to close lanes and alleys. But said corporation does not own the streets of said city in fee, and has no control over them, except what is necessary to enforce such ordinances as it has made or may make, not inconsistent with the laws of said state."

Atlantic City Water-Works Co. vs. Consumers' Water Co. 15 *Atl.* 581,

The case was a suit by one water company to enjoin another water company from laying pipes in Atlantic City. The law under which both companies were organized is described in the opinion as follows:

Page 582

"The statute under which both were organized de-

clares by its first section that any number of persons not less than seven, a majority of whom shall reside in this state, may form a company for the purpose of constructing, maintaining, and operating water-works in any city, town, or village in this state having a population of not more than 15,000 nor less than 2,000 inhabitants, for the purpose of supplying such city, town, or village, and the inhabitants thereof, with water. The second section prescribes how a corporation may be formed. A ceritficate is to be made, stating the name adopted by the corporation, the amount of its capital, and certain other facts, and this certificate, 'together with the consent in writing of the corporate authorities, if any, of the town or city proposed to be supplied with water,' must be filed in the office of the secretary of state. The third section declares that when such certificate and consent shall have been filed, the persons who shall have signed and acknowledged the certificate, and their successors, shall be a body politic and corporate."

The city had given its consent to the incorporation of both companies. The first then claimed an exclusive right. This claim the court denied.

Appeal of Borough of Millvale, 18 *Atl.* 993

This is a case of a steam railroad. The law upon which the rights of the railroad company is based is not quoted but is referred to as follows:

Page 997:

"In the present case the right to lay the track upon any public road then opened, or thereafter to be opened, is expressly given, without any qualification, and hence the consent of the borough of Millvale to the construction and operation of the road over its streets need not be obtained, and is a matter of indifference. But the charter does require that in order to cross the Ewalt-Street bridge the consent of the bridge company must be obtained and the right to use steam-power in the city of Pittsburgh also requires the consent of the bridge company, a majority of the property owners on Ewalt street, and the councils of the city. The necessity of obtaining consent in these special instances intensifies the force of the proposition that consent is unnecessary for all other purposes of the defendant in the exercise of its franchise."

In re Johnston 69 *Pac.* 973,

The right in the streets in this case was claimed under the

then existing provisions of Section 19 of Article 11 of the Constitution of the State of California. The court says:

Page 975.

"Section 19 of article 11 of the constitution declares: 'In any city where there are no public works owned and controlled by the municipality for supplying the same with water, or artificial light, any individual or any company duly incorporated for such purposes under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.' In People v. Stephens, 62 Cal. 209, the above section was construed by this court to be a direct grant from the people to the persons therein designated of the right to lay pipes in the streets of a city for the purposes specified, without waiting for legislative authority, or being subject to any restrictions from that branch of the government; the court saying, with reference to the privilege of laying pipes in the public streets and thoroughfares of any city: 'That privilege is expressly granted by the section of the constitution cited, subject to the direction of the superintendent of streets, or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and indemnity for damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof.' The only limitation upon this privilege are those contained in the language in which it is granted, viz., that the work shall be done 'under the direction of the superintendent of streets, or other officer in control thereof,' and 'under such general regulations as the municipality may prescribe for damages and indemnity for damages.' Upon a compliance with these conditions, any individual or company duly incorporated for such purpose is given the privilege 'of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein so far as may be necessary for introducing into and supplying such city and its inhabitants either with

gas light or other illuminating light, or with fresh water for domestic and all other purposes.' The municipality may prescribe regulations 'for damages and indemnity for damages' but these regulations must be 'general,'—i. e., uniform in their application to all who may desire to exercise the privilege. The designation of 'damages and indemnity for damages' as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privilege. When the sovereign authority of the state, either in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality, where such right is sought to be exercised or injoyed, to impose additional burdens or terms as a condition to its exercise. The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one; and the right to annex one condition to the exercise of the privilege implies the right to annex others, which may be at least impair, if not in fact amount to a denial of, its exercise. The provision that the work is to be done under the direction of the superintendent of streets gives all the protection for the use of the streets that could be obtained under a permit; and, under the provision authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city will be fully protected against any pecuniary loss or detriment."

It will be noted that the regulations which the city may make are expressly limited to "such regulations as the municipality may prescribe for damages and indemnity for damages."

People vs. Stephens, 62 *Calif.* 209

A case based upon the same constitutional provision as contained in re Johnson, supra.

Iowa Tel. Co. v. City of Keokuk, 226 *Fed.* 82

This is another telephone case. The statute of Iowa upon which the rights of the telephone company are based appear from the opinion at page 87, as follows:

"Section 780 of the Iowa Code of 1851 provided:

'Any person or company may construct a telegraph line along the public highways of this state, or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor.'

"This was enacted as section 1348 of the Revision of 1860, and again as section 1324 of the Code of 1873. In 1882 it was amended (chapter 104 of the Acts of the Nineteenth General Assembly, by inserting the words 'or telephone' after the word 'telegraph.' In 1888 the Legislature for the first time gave direct power to cities to 'regulate' telephone and telegraph, electric light, district telegraph, and other electric wires. Chapter 16, Acts of the Twenty-Second General Assembly.

"The first legislation in Iowa in which cities were directly empowered to grant authority to telephone systems appears in the Code of 1897, as follows:

'Sec. 775 Regulation as to Electric Wires. Cities and towns shall have the power to authorize and regulate telegraph, district telepragh, telephone, street railway and other electric wires.'

"Or, as applied to cities acting under special charter:

'Sec. 955 * * * They may also grant individuals or private corporations the authority to erect, maintain or purchase such works or plants, or railways, street railways or telephone systems, for the term of not more than twenty-five years, and may renew or extend the term of such grants for a period not exceding twenty-five years; but no exclusive franchise shall be thus granted, extended or renewed, and no franchise shall be granted or authorized, until after notice of the application therefor has been published once each week for four consecutive weeks in some newspaper published in such city. (23 G. A. c. 11, section 1; 22 G. A. c. 11, sections 1, 2; 22 G. A. c. 26; 14 G .A. c. 78, section 2-5; C. '73, section 471.)'"

The telephone company and its grantors had been occupying the streets of Keokuk since about the year 1882 under Section 780 of the Iowa Code, which section was adopted in 1851. After new provisions had been adopted by the legislature of Iowa, subsequent to the erection of the poles by the telephone company in the city of Keokuk, and on August 3, 1913, the city adopted an ordinance requiring telephone companies to secure a franchise. The court held that this ordinance was void as to the Iowa Telephone Company but that it would not be void as to any company seeking rights in the streets of the city after its passage because at that time sections 780, 775 and 955 should be construed together.

Abbott vs. City of Duluth, 104 *Fed.* 833,
Page 836

"The first question to be considered as arising upon the facts stated is whether the Duluth Telephone Company

had the right to construct and has the right to maintain its poles and wires in the streets and alleys of the city of Duluth, in the absence of special authority from the common council, and irrespective of the special acts referred to, which gave it such right exclusively, while they were in force, but which expired on March 8, 1899. The first legislation bearing on the subject is chapter 12 of the General Laws of 1860 (section 1), which provides that:

'Any telegraph company incorporated or organized under the laws of this state, shall have full power and right to use the public roads and highways in this state, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or other fixtures, provided, however, that the same shall be located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads and highways.' "

Page 837

"This view is strengthened, so far as legislative interpretation may stregnthen it, by the amendment enacted by chapter 73 of the General Laws of Minnesota of the year 1881, which inserted after the word 'telegraph' the words 'or telephone'; thus granting to telephone companies the same power and right to use the public roads and highways in this state which had before that time been granted to telegraph companies."

Page 838:

"Chapter 74 of the Laws of 1893 has no bearing. It can only be given a prospective construction, and be held applicable to enterprises undertaken after its passage. The plant of the Duluth Telephone Company had been constructed, and its rights had become vested rights, and beyond the power of the legislature to destroy or diminish, before the passage of that statute; so that it is needless to resolve the doubt whether it applies to telephone wires supported upon poles and along streets and alleys in cities and villages, or only to all railways, and to such other constructions as are placed beneath the surface of the ground."

Hodges, City Tax Collector, v Western Union Tel. Co. 18 *South*, 84.

An Ordinance of Meridian, Missouri, imposing a license fee was held invalid.

Page 84:

"We are not advised by the record whether the fee in the streets of Meridian is in the city, or whether the city has a mere easement; but it is not denied that the power of the city to deal with the streets is derived wholly from a

charter granted by the legislature, and hence, of course under legislative control. The legislature, by the act of 1886 (Laws 1886, p. 93) Section 1, provided that any telegraph company chartered by the laws of this, or any other state of the United States, shall, upon making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph lines * * * on, across and under legislative control. The legislature, by the act of along all * * * streets, * * * etc, interfering with "the convenience of any land-owner, no more than may be avoidable." The following sections provide for compensation to turnpike and railroad companies, and private owners, for the use and occupation of their "ways," "structures," or lands. No compensation was provided for cities, in case their streets should be used; but the use and occupation of so much of the streets of cities as may be reasonably needed for the construction and maintenance of telegraph poles and telegraph lines is expressly authorized, without compensation to the state or to the cities—municipal subdivisions of the state. Without this act the appellee could not have entered upon the streets of the city of Meridian for the purpose of constructing and maintaining its telegraph lines; and under it, it could only have so entered and occupied its streets, with its poles, by virtue of the right of eminent domain, upon due compensation first made, had not the terms of the act clearly shown that such compensation was dispensed with."

New Orleans Gas Co. vs. Louisiana Light Company,
115 *U. S.* 650

The legislative grant in this case is described by this court as follows:

Page 651:

"By an act of the legislature of Louisiana, passed April 1, 1835, the New Orleans Gas-Light and Banking Company was incorporated and was given 'the sole and exclusive privilege of vending gas-lights in the city of New Orleans and its faubourgs and the city of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same;' to which end it was authorized to lay pipes or conduits at its own expense in any of the public ways or streets of those localities, having due regard to the public convenience. The right was reserved to the city, after the expiration of forty years, to buy such gas-works as the company constructed, and pay for the same in city bonds. If the city declined to purchase, then its bonds, which the

company had received in payment of its subscription of stock, were to be renewed for twenty years."

Russell vs. Sebastian, 233 *U. S.* 195,

The rights of the gas company in this case were based on Section 19 of Article 11 of the Constitution of the State of California before it was amended by the amendment of October 10, 1911. This constitutional provision as set forth at page 198 and is the same as the constitutional provision quoted above in the opinion in re Johnson, supra. The amendment of October 10, 1911, which is in page 198 of the opinion is as follows:

"Sec. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be required by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish works for supplying the inhabitants with such service upon such conditions and under such regulations as the municipality may prescribe under it organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

This is nearer the language of Section 24 of the act of February 24, 1887 of the Territory of New Mexico than the old section of the California constitution. Under this amendment of the California constitution of October 10, 1911, this court in Russell vs. Sebastian intimated that any company seeking to commence the operation of a public utility in the streets of any California city after the adoption of such amendment must secure a franchise from the city and expressly held so in *Pomona vs. Sunset Tel. & Tel. Co.* 224 *U. S.* 330, 32 *Sup. Ct. Rep.* 477.

The opinion of this court in the case of Russell vs. Sebastian was a review of the opinion of the Supreme Court of the state of California in *Ex Parte Russell* 126 *Pac.* 875. The opinion of the Supreme Court of California was reversed because the California court had held that the rights claimed by the Gas Company arose after the adoption of the amendment of October 10, 1911. This court held that their rights had become vested before the amendment of October 10, 1911. The Supreme Court of California held that under such amendment public utility corporations could not acquire a right in the streets of a town

or city without the consent of such town or city; that the design of such amendment was to place all such public utilities, even when privately operated, under the control of the municipality. This same construction was adopted by this court in the case of Pomona vs. Sunset Tel. & Tel. Co., supra.

Los Angeles vs. Los Angeles Gas. Corp. 251 *U. S.* 32,

The rights of the Gas Company in that case were derived from the same Section 19 Article 11 of the California Constitution prior to the adoption of the amendment of October 10, 1911, the same as the rights of the gas company in Russell vs Sebastian.

These cases, relied upon by the Trust Company, when viewed in the light of the statutory and constitutional provisions involved, are not authorities sustaining the contention of the Trust Company with respect to Section 24 of the act of the Territorial Legislative Assembly of New Mexico, entitled, "An Act to authorize the formation of companies for the purpose of constructing irrigating and other canals and the colonization and improvement of lands."

Thus upon the main question involved in this case we have shown that the Water Works Company does not have any right to maintain its pipes, mains, conduits and other works in connection with its water works system in the public streets, alleys and places of the city of Raton after the expiration and termination of the grant made by the Franchise Ordinance No. 10.

There are two minor matters to be considered in connection with this main question. They are with respect to the property purchased by the Water Works Company from the Raton Water Company and the alleged contract between the Water Works Company and the Atchison, Topeka and Santa Fe Railway Company.

4. *The property purchased by the Water Works Company from the Raton Water Company.*

It is alleged in the complaint that in 1882 the Raton Water Company was organized and commenced furnishing water to the Atchison, Topeka and Santa Fe Railway Company and other persons in the territory, afterwards formed into the Town of Raton; that in April 1912 the Water Works Company purchased the pipes and other property of the Raton Water Company. There is no allegation in the complaint that the Raton Water Company was organized under any law granting to such company rights of way or easements in any public road or street and at that time there was no law of such character. There is no allegation that the Raton Water Company acquired any easement in any public highways by virtue of any contract as was done in the case of Agua Pura Company vs. Mayor and Board of Aldermen, 10 N. M. 6,

There is no allegation that the Raton Water Company acquired any rights of way from any private individual. From aught that appears in the amended complaint, the Raton Water Company did not have any rights of way or easements in any property, private or public, and therefore had none to convey. The time of the purchase of the pipes of the Raton Water Company by the Water Works Company was April 1912. This was between the date when the Water Works Company accepted the Franchise Ordinance No. 10 and the date when it completed its system in accordance with the terms of such franchise. It would appear, therefore, that this purchase of these pipes was a method adopted by it in the completion of its water works system under said franchise. There is and can be no easements or rights of way in the public streets, alleys and other places of the city based upon the purchase of these pipes.

5. *The contract with the Atchison Topeka and Santa Fe Railway Company.*

In the amended complaint it is alleged that upon some date not stated, the Water Works Company entered into a contract with the Atchison Topeka and Santa Fe Railway Company, under which contract the Water Works Company was to furnish the railway company with water until the year 1930. There seems to be no claim made that the Water Works Company could extend its franchise by making any such contract. Certainly it is not the law that a public utility having a limited franchise right in a town or city can extend the term of such franchise by entering into a contract with a private consumer.

III.

INCIDENTAL QUESTIONS.

We have discussed what we have termed the main question in this case upon the theory that if the Water Works Company has the right to operate a waterworks system in the City, and the City was wrongfully depriving it of that right, then such wrongful act on the part of the City would diminish the security under the Trust Company's Mortgage, and upon that basis the Trust Company would have the right to maintain this action. We have shown that the Water Works Company has no such right, and that therefore the City is committing no wrongful act in requiring the Water Works Company to remove its pipes from the streets, alleys and public places of the City of Raton. There are, however, certain other incidental property rights mentioned in the amended complaint. As stated by the appellant these other rights are of small value if the Water Works Company no longer has a franchise to occupy the public streets and alleys of the City. They must, however, be considered. They can be described under three classes.

1. Lands, including a reservoir constructed thereon which it is alleged the City has enlarged, and upon which land it is alleged the City has laid a water pipe.

2. The right to take water from Sugarite Creek for the purpose of supplying the Water Works Company's customers in the City, and with respect to this water right it is alleged that the City is now taking its water from the same source.

3. An alleged claim for damages existing in favor of the Water Works Company and against the City, because of the City's termination of the franchise Ordinance No. 10 before its expiration.

With respect to these classes of property and property rights, the questions are different than those arising with respect to the claimed franchise rights. The acts of the City with respect to the franchise rights would be to destroy them, if any exist, and by such destruction diminish the security under the mortgage. With respect to the remaining property what the City has done and is now doing, is merely holding the posssession thereof, and unless the Trust Company is entitled to the present possession thereof, it has not stated a cause of action with respect to such property and property rights. There is no allegation in the complaint that the mortgage under which the Trust Company claims its rights, contains a provision to the effect that the mortgagee shall be entitled to the possession thereof before foreclosure or sale.

STATUTE AND DECISIONS OF NEW MEXICO

In 1876 the Territory Assembly of New Mexico adopted a law which among other things provided as follows:

> "In the absence of stipulation to the contrary the mortgagor of real or personal property shall have the right of possession thereof."

This law is now found in Section 571 New Mexico Statutes Annotated Codification, 1915. This statute is similar to statutes adopted in many states, and the force and effect of it is construed in the case of *Stearns-Roger Mfg. Company vs. Aztec Company,* 14 *N. Mex. at* 327, wherein in the principal opinion of the case it is said:

> "This court in Cleland v. Alexander, 86 Pac. 425; speaking through Chief Justice Mills, makes use of the following language: 'However created, a lien (and a mortgage is a lien) *is not an interest in land,* but merely a security for the payment of a debt.' Citing numerous authorities in support of that statement, and while the court did not then have this statute under consideration, yet the principle is the same and is sustained by the great weight of authority in the United States, and may be said to be the

modern doctrine and generally accepted as the true one in this country. 27 Cyc. 961 and authorities cited." Jones on Mortgages (2 Ed.) Sec. 58.

This has always been the doctrine held to by the Courts of equity and 'the equitable view has largely encroached upon and sometimes quite superseded, the legal, even in courts of law." 1 Jones on Mtgs. Sec. 8.

The mortgagee has no interest in the land described in his mortgage until default in the terms of the mortgage. He cannot take the possession, nor interfere in its management or control, unless his security may be diminished. A transfer of the indebtedness, as the endorsement and delivery of the note secured, carries with it the mortgage, which is only an incident to the debt, and unless the mortgage carries with it a power of sale, he must foreclose by a suit in equity before he can apply the proceeds to the payment of his debt when due.

The case then quotes from 27 Cyc. 967, to the effect that a deed of trust executed for the purpose of securing a debt is essentially a mortgage. The deed of trust involved in the case is set forth in the statement of facts commencing on page 312. After the quotation from Cyc. the court continues in its opinion on page 328 with this language:

"It is contended that this Trust Deed is a grant coupled with an interest and is not in the nature of a mortgage, but a scrutiny of the instrument, which is set out in the statement of facts, must convince one of its nature.

There appears on its face no other intention of the parties, than that of security for the debt named therein, and the court will always look at the substance rather than the form."

On page 330 of said report commences the concurring opinion of Judge Pope, which is confined to the proposition that a mortgagee takes no title to the property, but only has a lien thereon to secure the payment of his debt, and in this concurring opinion the history of the growth of this idea is developed and the opinion shows that while it is based upon the statute in New Mexico, still it is the common sense view of the matter and in many states the idea is the result of the growth of judicial dcisions without any statute. This concurring opinion of Judge Pope is such a complete brief upon the subject, of the rghts of a mortgagee, where the possession of the property remains in the mortgagor, that we quote the entire concurring opinion:

"The opinion of the court contains an announcement of the doctrine that under the laws of this Territory a mort-

gage passes no legal estate but is a mere lien. While assenting fully to this conclusion, the practical importance of this question, which has been a much mooted one in this Territory for many years, leads me to record my reasons for concurring in this decision of the court and in so doing to trace briefly the history of the doctrine thus adopted as the rule in our own jurisdiction. At common law the rule was undoubted that a mortgage vested the title to real estate in the mortgagee with the accompanying right of possession, and as between mortgagor and the mortgagee the latter was the legal owner. Brobst vs. Brock, 10 Wall. 59; Cotton vs. Carlisle (Ala.) 7 A. S. R. 31. This doctrine has been superseded in many jurisdictions by statute, in others without statute, and even in those jurisdictions which have retained the common law rule it has been limited so that the mortgagee's interest is treated as real estate only so far as is necessary for his protection and to give him the full benefit of his security. Hutchins vs. King, 1 Wall. 53-60; Waterman v. McKenzie, 138 U. S. 259; Lightcap vs. Broadley, 186 Ill. 510; and it has been held that a sale or conveyance of the estate is not one of the purposes for which the mortgagee's interest is to be so treated. Bell vs. Morse, 6 N. H. 205. The tendency of the decisions is shown by Carpenter vs. Logan, 16 Wall, 275, where it is held that 'the debt is the principal things and the mortgage an accessory', and by Watermen vs. McKenzie, supra, where it is said that mortgages of real estate have 'come to be more and more considered as a mere security for the debt, leaving the title in the mortgagor." The New York Courts at an early date led in a departure from the common law rule, and their influence is shown in the fact that practically all of the States west of the Mississippi now hold that a mortgage is a mere lien, passing no title. The views of the various state courts are fully set out in 1 Jones on Mortgages (6th Edition) Secs. 13 to 59, where it is said after reviewing the several state doctrines (Sec. 59): 'Grouping the states geographically, it will be noticed that the English doctrine of the nature of mortgages, with slight modifications, prevail east of the Mississippi in a large majority of the states, while west of the Mississippi, except only in the states of Missouri and Arkansas, the doctrine everywhere prevails that a mortgage passes no legal estate or right of possession.' This condition of things is ascribed by the same learned author (Sec. 59) not so much to statute as to the influence of the early New York cases and the civil law; and in California, whose Supreme Court, speaking

through Mr. Justice Fields, has been most potent in implanting the New York doctrine west of the Mississippi, the courts in addition to holding that 'a mortgage is mere security for the debt and vest no title either before or after condition broken,' (McMillan vs. Richards, 9 Cal. 410; Nagle v. Macy, 9 Cal. 426.) indicate that such holding is not the result of statute but is equally applicable upon sound principle to mortgages executed prior to the California statute. Dutton v. Warschauer 21 Cal. 623; Mack v. Witzear, 39 Cal. 255. It is undoubtedly true, however, that the divergence from the common law not only in New York but in the Western jurisdictions has been largely the result of statutes, some of them declaring that the right of possession shall continue in the mortgagor and others declaring in terms that a mortgage shall be construed as a mere lien, McMillan vs. Richards, 9 Cal. 410 and Fogarty vs. Sawyer, 17 Cal. 592, indicate the influence of the New York and California statutes on the subject. The Oregon Statute is discussed in Teal vs. Walker, 111 U. S. 250 and is held to 'cut up by the roots the common law doctrine and to 'give effect to the view of the American Courts of equity that a mortgage is a mere security for a debt.' The same statute is considered in Savings Society v. Multnomah Co., 169 U. S. 426. Among the cases developing the doctrine mostly as to the result of statutory provisions, are Chick vs. Willets, 2 Kans. 384; Caruthers vs. Humphrey, 12 Mich. 270; Humphrey vs. Hurd, 29 Mich. 44; Hoffman vs. Harrington 33 Mich. 392; Gallatin vs. Beatty, 3 Mont. 173; Balduff vs. Griswold (Oklahoma), 60 Pac. 223; Stevens vs. South Ogden Company (Utah), 58 Pac. 843; State vs. Supr. Court (Washington) 58 Pac. 1065; Wood vs. Trask (Wis.), 76 A. D. 230; Wright vs. Henderson, 12 Tex. 43; Drake vs. Root, 2 Colo. 685; and cases cited in 1 Jones on Mortgages, Secs. 13-59. While the precise question has never been expressly decided by this court it is held in Territory vs. Co-operation Bldg. & Loan Association, 10 N. M. 337, that real estate mortgages are personal property, and this court in speaking in this case through Mr. Justice McFie, uses expressions which indicate the views of the court to be that a mortgage is primarily a security. There are expressions to the same effect in Alexander vs. Cleland, 86 Pac. 425, cited supra in the opinion of the court. Considering the question, however, as an open one up to the present time and recognizing the common law rule as prevailing in this Territory unless altered by statute, I am of the opinion that the legislature by C. L. Sec. 2365, has

changed the common law rule and that the reason of all the cases above cited from Western jurisdiction applies to this Territory. At common law, as we have seen, the making of the mortgage conferred the right to immediate possession upon the mortgagee as in the case of any other grantee. But our legislature has provided by C. L. 2365 that in the absence of stipulation to the contrary 'the mortgagor of real x x x property shall have the right of possession thereof.' This, by withholding from the mortgagee the right of possession until foreclosure, sale and purchase 'cuts up by the roots the common law doctrine' (Teal vs. Walker, supra) and 'deprives the mortgagee of the only material advantage which remained to him from being considered the owner of the fee.' (Chief Justice Emmett in Adams vs. Corriston 7 Minn. 456). This statutory provision in my judgment changes the common law rule and places the law in this Territory upon the same basis as in California and the other Western jurisdictions.

This is the view evidently taken by the learned author of Jones on Mortgages, for at Sec. 43 he quotes our C. L. Sec. 2365 and at Sections 58 and 59 names New Mexico expressly as being among the jurisdictions in which the mortgage "passes no title or estate x x x x to the mortgagee, and gives him no right of possession before foreclosure.' It is not a cause for regret that this statutory provision makes it possible to declare the law in New Mexico to be thus in accord with common sense, as opposed to a common law fiction. In popular opinion a mortgage is universally regarded as a lien. Men buy and sell mortgaged realty and always consider that they are purchasing not a mere equity of redemption but the property itself, subject only to the obligation to pay off the lien of the mortgage. The nearer law can be brought to the basis of common sense and every day comprehension the nearer it will be a rule of conduct lived up to in public and private life, and the stand taken by the Western Courts on this subject have tended very strongly to this salutory result. As is well said by the Supreme Court of Kansas in Chick vs. Willets, 2 Kas. 386; 'In this state a clean sweep has been made by statute. The common law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning except in reference to those theories—with which our reflections are still embarrassed, the legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things.' For these rea-

sons I concur in the doctrine announced by the opinion of the court on this subject."

The above case has been cited and approved in later New Mexico cases as follows:

First National Bank vs. Clark 153 *Pac.* 69 *at* 72,
Cleveland vs. Bateman, 153 *Pac.* 648 *at* 651, 21 *New Mex.* 675.
Eccles, vs. Will, 170 *Pac.* 748 *at* 749,
Enfield vs. Stewart, 174 *Pac.* 428 *at* 430.

In the last case the court says:

"(3) Our conclusion in this respect is undoubtedly correct, unless it can be urged that the plaintiff in the trial court was not a stranger to the title in that she was a mortgagee. In this connection we believe it is pertinent to say that the action is a possessory one, and plaintiff's right to maintain the same would undoubtedly depend on her right to possession, which she did not assert in the absence of a showing of a breach of the conditions of the mortgage entitling her to enter into possession. The record in this case does not disclose that she has asserted any such right, and we think for the purposes of this case, so far as the record discloses, she is a stranger to the title in the sense in which it is used in the Missouri case. We are not unmindful either of the fact that a chattel mortgage has been generally held to be a transfer of title of personal property as security for the payment of money or performance of some other act or condition. 6 Cyc. 985. The right of possession as between the parties, in the case of chattel mortgages is fully discussed in Jones on Chattel Mortgages (5th Ed.) 426 et seq. As pointed out by that author, New Mexico has provided by statute that:

> 'In the absence of stipulation to the contrary a mortgagor of real or personal property shall the right of possession thereof.'

Judge Pope, in a concurring opinion in the case of Stearns-Roger Mfg. Co. et al vs. Aztec G. M. & M. Co. 14 N. M. 300, 93 Pac. 706, construing the statute referred to, which appears as section 571, Code 1915, pointed out that a mortgage passes no legal estate, but is a mere lien. This rule has been followed in New Mexico as to real estate mortgages. It is a construction of the statute referred to covering both real and personal property mortgages, and we see no reason why the rule should not be extended to chattel mortgages. We therefore conclude that a chattel mortgage does not convey the legal title to the mortgagee, but is a mere lien."

With respect to personal property, the concurring opinion of Judge Roberts in the case of *Ross vs. Lewis,* 169 *Pac.* 468 *at* 471 is important. There are only two judges deciding the case, so Judge Robert's concurring opinion has as much effect as the opinion of the court. This concurring opinion is as follows:

> "I agree that appellants were not entitled to recover. Their action was in trover for the conversion of two head of horses. The bill of sale under which their rights arose, was in fact a mortgage, given to secure the appellants against loss as sureties. There was no breach of its conditions until after they had paid the debt, and, there being no stipulation to the contrary, the mortgagor, under section 571, Code 1915, was entitled to retain possession of the mortgaged property until the condition of the mortgage had been broken. Kitchen vs. Schuster, 14 N. M. 164, 89 Pac. 261. Appellants, although they might have done so, did not pay the debt, the payment of which they had secured, until after the estate had been settled. At the time possession of the property was demanded, the condition of the mortgage had not been breached, and they were not entitled to possession. Neither were they entitled to possession at the time of the alleged conversion. This being true, an action in trover for the conversion of the property would not lie. In 38 Cyc. 2044, it is said:
>
> > 'He who seeks to recover in trover must prove that he was in actual possession of the chattel converted at the time of the conversion, or that he had the right of immediate possession thereof.'
>
> Neither possession nor right of possession being in appellants, at the time of the alleged conversion, they were properly denied relief. The foregoing reasons, I believe the judgment should be affrmed."

In Colorado, a mortgage is considered a lien, the same as in New Mexico, and California cases have been followed in Colorado the same as in New Mexico. In the case of *P. & A. B. R. R. Co. vs. Beshoar,* 8 *Colo.* 32, 5 *Pac.* 639, it was held that a mortgagee has a lien merely, and if out of possession and not entitled to possession, cannot maintain an action for damages. The injuries averred and proven consisted in the damaging of fences, crops, irrigating ditches, etc., by the construction of appellant's railroad upon and across the premises described in the complaint. At the time of the commencement of the action the plaintiff had taken no steps to foreclose or sell the property or obtain the possession thereof. Therefore the court held that he was not entitled to any damages.

ARGUMENT.

Under the above authorities, it is clear that the legal title of mortgaged property remains in the mortgagor; that until, by sale or other foreclosure proceeding, the mortgagee has reduced its lien to ownership or right to possession, the possession, management and control of the mortgaged property, remains in the mortgagor. With respect to the land, therefore, the entry by the City does not destroy or in any way diminish the security of the mortgagee. It is merely an act relative to the possession of the property. It is such an act as the mortgagor itself could do with the property under its right to possession, management, and control thereof. If the city has done this act without exercising its power of eminent domian, then this possession is subordinante to the right of the lien created by the mortgage, and upon foreclosure of the mortgage, its rights of possession would necessarily cease. It must be remembered, however, that the City has the right of eminent domain.

City of Raton vs. Raton Ice Company, et al 191 Pac. 516.

In the above case, the question of the City's right to condemn the very property involved was before the Supreme Court of the State of New Mexico, and such right was upheld. Under these circumstances a court of equity would not grant an injunction in the nature of a mandatory injunction having the effect of a writ of restitution to oust the City from the possession of this property, but would relegate the owner thereof to its action at law for damages. The right of possession is all that is involved, the right of possession is not in the Trust Company; therefore it cannot maintain an action with respect to the possession.

Water has been mentioned. The property right with respect to water in a flowing stream is not a right to the water itself before it is taken from the stream, but it is the right to take the water from the stream that constitutes the property right. It appears from the allegations of this complaint, and from the brief filed herein by the appellant that the Waterworks Company's right to take water from Sugarite Creek was solely for the purpose of furnishing such water to its customers in the City of Raton. It is fair to assume therefore, that if it cannot use this water for that purpose it has no further use for the water. Whether this be true or not, the taking of water from the stream from day to day cannot be considered anything more than exercising a right to the possession thereof during that time. The Trust Company, not having the right to possession, cannot complain because the City is now in possession thereof

whether that possession be wrongful or with the consent of the Water Works Company. However such possession was obtained it is subject to the lien of the mortgage if the Water Works Company has such a property right and it is covered by the mortgage, but the mortgagee cannot maintain an action merely to control the possession of the property until it has foreclosed its mortgage by sale or otherwise, and pursuant to such foreclosure proceedings become entitled to the possession.

With respect to the alleged claim existing in favor of the waterworks company against the City for damages, that is either a claim based upon a tort committed by the City against the Water Works Company, or a claim arising out of contract in favor of the waterworks Company and against the City. In either event the claim is in favor of the Water Works Company. Whether or not such claim would be covered by the mortgage makes no difference. If it be covered by the mortgage, the mortgage is simply a lien thereon without the right of possession thereto in the mortgagee. Before the mortgagee can maintain an action to recover such a claim, it must take the necessary steps to foreclose its mortgage and obtain the right to the possession thereof. The claim with respect to this is similar to the claim of the plaintiff in the case of Enfield vs. Stewart 174 Pac. 428.

With respect to these incidental items of property which have really no value except in connection with a franchise to supply the City of Raton with water, the plaintiff has not stated a cause of action.

We refrain from the discussion of some other incidental questions with respect to parties, etc. which might be discussed, such as that the Water Works Company is a necessary party plaintiff because it is the party who is the owner of these incidental property rights involved, and it is entitled to the possession thereof, if the acts of the City with respect thereto are in any respect wrongful.

IV.

LACHES.

With respect to this case generally, it may properly be said that the plaintiff has been guilty of gross laches. In 1912 the City of Raton took its first steps towards the building and acquisition of a municipally owned waterworks system. This system was completed about July 1st, 1915. On August 6th, 1915 the franchise of the Water Works Company was revoked and the Water Works Company was ordered and directed to remove its pipes from the strets, alleys and public places in the City of Raton. As shown by the amended com-

plaint in this case, the City in 1915 commenced furnishing water to practically all the comsumers of water in the City of Raton and has continued to do so ever since. In order to accomplished such object it has issued three hundred thousand dollars of negotiable bonds, and has expended large sums of money building a waterworks system, erecting reservoirs and laying pipes, all of which was done before July 1st, 1915. It is true that this suit was originally commenced October 27th, 1915, but the original complaint was based upon an alleged obligation of the City to purchase the waterworks system of the Water Works Company, and was a suit for the specific performance of that alleged obligation. In that condition, the case remained until February, 1920, when a motion to dismiss that complaint was sustained. The matters of which the Trust Company now complains all existed on the 6th day of August, 1915, but they were not called to the attention of the court, or made the basis of this action until the filing of the amended complaint on March 15th, 1920, a period of more than four and a half years after the acts complained of took place. The acts complained of had their inception at the election held on April 2nd, 1912. The Trust Company stood by while the City spent its money in building its own plant, has stood by, according to the allegations of the amended complaint, while suits were fought out between the Water Works Company and the City, one of which was in the Federal Court and one in the State Court. After all these things have been done, the Trust Company now comes in by its amended complaint on March 15th, 1920, and asks that the court give it injunctive relief, ousting the City from the waterworks system which it has constructed and completed and operated for a period of practically five years before the filing of this amended complaint, with the approbation of the courts, so far as the right to possession under the eminent domain laws of New Mexico is concerned, and so far as the Waterworks Company is concerned, under the decision of Judge Pope. It is said in the amended complaint "that by agreement of counsel for the respective parties herein, the prosecution of this proceeding was delayed until said causes (referring to the cases in the Federal and State Courts between the Raton Waterworks Company and the City of Raton) should have been determined." This is evidently inserted in this amended complaint as an excuse for a lack of diligence on the part of the Trust Company. Assuming that such agreement was made, it must have been with reference to the cause of action attempted to be stated in the original complaint, which cause of action was for a specific performance of an alleged obligation to purchase. The Raton Waterworks Company was

prosecuting such a case in the State Courts at the time the original complaint in this action was filed. Before the motion to dismiss the original complaint was heard, that case had been decided by the Supreme Court of New Mexico.

Raton Waterworks Company vs. City of Raton, 22 New Mexico 464,

That court had held that the Water Works Company was guilty of laches, and could not maintain the action even if the right had existed. The Trust Company instead of amending its original complaint so as better to state a cause of action based upon its claimed right to specific performance of this alleged obligation, abandoned that cause of action and in its amended complaint went into new fields, attempted to set up new causes of action, sought new and different kinds of relief and certainly with respect to those matters it cannot be said that its lack of diligence is excused by any agreement of counsel with respect to the cause of action alleged in the original complaint. We do not believe it necessary to cite any authorities upon this question of laches.

V.

CONCLUSION.

The action of the lower court in sustaining the motion to dismiss the amended complaint was correct, and we respect fully submit that such decree should be affirmed.

JOHN H. FRY,
Solicitor for the Appellee,
The City of Raton,

IN THE

United States District Court

FOR THE

District of New Mexico

RATON WATER WORKS COMPANY,

Plaintiff,

vs.

CITY OF RATON OF COLFAX COUNTY, STATE OF NEW MEXICO,

Defendant.

IN EQUITY
No. 388

(Opinion of District Court. Filed February 9, 1916)

The petitioner prays for relief in a number of directions.

(a) By the original bill it prays that because of an exclusive franchise conferred upon it by a certain ordinance No. 10 effective for 25 years from July 15, 1891, the defendant city be enjoined from entering into competition with it in the operation of a water works system.

(b) By supplemental bill it seeks to enjoin the enforcement of a certain ordinance No. 197 dated August 6, 1915, whereby the City Council undertook because of certain alleged violations of duty by the plaintiff company to cancel and revoke the franchise conferred upon said company by Ordinance No. 10

(C) By the same supplemental bill it prays that the city be enjoined from operating a certain filtration bed in connection with its system and from using certain facilities in the

house of one of the city's employes on the company's water shed, for the reason that each of them will pollute the plaintiff's water supply.

(d) By amendment to the bill it prays that the city be required as part of its duty under Ordinance No. 10 to pay the city the amount due thereunder for hydrant rentals amounting to $14,646.06.

(e) By the same amendment it alleges that the city by condemnation proceedings has taken possession of and is occupying jointly with plaintiff the site of Lake Maloya owned by the company, that such interference with plaintiff's possession is not justified by the New Mexico statutes on the subject of condemnation and the company prays that the city be enjoined from occupying said site.

By way of defense, the city alleges as to (a) that the company has violated its franchise by failing for years to furnish water in quality and amount as prescribed by Ordinance Ten and that by reason of this the city was called upon in protection of its inhabitants to erect a water system in competition with plaintiff, and that such rival system is thus justified even if, as is denied, Ordinance Ten originally conferred a franchise exclusive against the city. As to (b) it says that Ordinance No. 197 is justified by the persistent failure of the company to comply with its duties under Ordinance No. 10. As to (c) that the filtration plant is to be so operated that no tailings therefrom will get into the water supply of the company and similar precautions will be taken as to the employe's house complained of, before the same shall be used. As to (d) that this is not an element recoverable in this case being one for an action at law; that aside from this the city failed to furnish water as contracted for by Ordinance 10 and a certain Ordinance No. 104 supplemental thereto, passed in 1901; and subject to these it sets up counter claims of damage in the sum of $123,000 on behalf of itself and its inhabitants. As to (e) it says that the possession of the Lake Maloya site is pursuant to an order of the State Courts in a certain case No. 4055, Colfax County, there pending between the parties hereto and that the ultimate right to condemnation and of joint ownership is proceeding to determination according to the course of judicial procedure in that case.

These make the issues for determination. The Court will in the main content itself with the announcement of its conclusions without an extended discussion of the facts.

(A)

As to the matter (a), Ordinance No. 10 confers upon the company the duty of furnishing defendant and its inhabitants with "good and wholesome water for domestic, manufacturing and sanitary purposes, as well as for the better protection of the town from disasters by fire." The ordinance prescribes the number of hydrants and the water pressure to be maintained under certain circumstances. But as to the character of the water there is no specific declaration of duty save such as is involved in the undertaking to furnish "good and wholesome water" for the purposes above named, a duty which it may be observed was implied from the very nature of the franchise, no less than from its express language.

The duty of a water company under circumstances such as this has been the subject of recent and authoritative discussion by the Supreme Court in Columbus vs. Mercantile Trust & D. Co. 218 U. S. 645. In that case it was said:

"The single object of the agreement was to obtain a constant and adequate supply of wholesome water. This was guaranteed in express terms, to say nothing of the necessary implication from the character of the contract. This guaranty was a continuing one, and dominated every other detail of the agreement. The company selected its own source of supply, and was under the highest obligation to continuously furnish an ample supply for all purposes of water which should be wholesome; that is, clean, pure, and fit for domestic use."

It was further said:

"If a municipality elect to contract with another for the discharge of this function, it is under the greatest obligation to require that the contractor shall engage to construct and maintain adequate means and furnish an adequate supply, in quality and quantity, to at all times meet the public necessity. So, too, the contractor must satisfy himself as to the sufficiency and quality of the source of supply, and maintain adequate storage and distributing instrumentalities to meet conditions. That his source of supply is at times adequate and wholesome is not enough. The wants of the public must, under all conditions, be supplied. We do not take account of temporary and unusual conditions which cannot be reasonably foreseen. But that which can be and should be foreseen must be taken into account by a private contractor who undertakes

so vital a function as that of supplying water to a growing community."

The Court proceeds:

"The continuing character of the obligation to furnish an adequate supply of wholesome water, as we have before suggested, is not met by showing that such a supply has been furnished at times, nor is the non-performance of the agreement excused by the occurrence of conditions which are likely to occur in a climate of long, dry summers. Nor is such a contract fulfilled by showing that, at the time of completion of the works, the company was able to carry out the contract. Ability to carry out the agreement must be maintained."

Proceeding upon these principles, the court there held that in the presence of such a default the city may declare the contract at an end, "May undertake the service and protection of its inhabitants by means of a municipal plant", and may by way of defense to an action by the company invoke the aid of a court of equity in enforcing the rescission of the contract. If the facts of the present case bring plaintiff within the rule stated in the Columbus case, the result is easily discernible. What, therefore, are the facts?

The franchise provides for "good and wholesome" water. To quote again the Columbus case, that means water which is "clean, pure and fit for domestic use." It must be clean i. e. must be free from such color or odor as repels the appetite therefor or renders it unattractive or unfit for human uses. It must be pure in that no germs of disease shall be present and no other foreign substance shall exsist to an extent such as to make the water physically unfit. The human system demands for perfect health a certain amount of water. If the physical appearance and qualities of the water are such as to repel its use and to make the intended user suffer thirst rather than undergo the discomfort or nausea of its use, such water is neither clean nor pure and its continued use may not be imposed upon a community. That the water furnished from the Raton Company's system was of this character hardly admits of question. Indeed, the proofs scarcely make an issue upon this. It is shown that (a) the water was unfit to drink both because of color and taste. The samples shown are in many instances repugnant to at least three senses. Numerous witnesses described it as "disagreeable", "repulsive", "offensive", "stinking", (b) It was unfit for use in the bath, because of its turbidity and odor. (c) It could not be used in the home laundry for the reason that it left an odor

in the clothing. (d) It detracted from the food in cooking. Coming to manufacturing and other public purposes:

(e) The barber shops were unable to use it because of the odor.

(f) It was not fit for use in the photograph galleries.

(g) The ice cream and lemonade parlors could not utilize it.

(h) In the pasteurizing of beer it was unsuitable.

(i) At the hotels and boarding houses it was a frequent and long continued source of complaint.

(j) At the public laundries, it discolored and gave an [ordor] to articles washed.

(k) The bakers found the water too muddy for their bread.

(l) The hospitals could not use it.

(m) The ice manufacturers had to use other water.

Much of the time in the trial was devoted to the question of whether the water caused disease. It may be doubted if any typhoid or other serious disease has resulted from it. On the other hand, it is reasonably certain that intestinal disorders were promoted thereby. But whether there be active disease or not, to give the public distasteful water and thus to discourage and curtail its use is to derange the human system and to break down its fortifications against disease. Water which has this effect is not "good and wholesome", whether it causes typhoid fever or not. But the decision of the case is not put upon the ground that water caused disease. The public has privileges other than exemption from illness or death. The citizen is entitled to drink palatable water, he is entitled to have such for domestic and manufacturing purposes, he is entitled to be clean—when he wishes to be. Of these and other privileges incident to the pursuit of happiness, the Raton water has deprived the residents of that place for many years. This was not, it is true, for the entire year. The water during the winter [month] was apparently free from great objection. But uniformly during the spring and summer these objectionable qualities appeared and reappeared at intervals. The aggregate number of days during which the water was seriously objectionable is variously estimated from "most of the time" to thirty days in each year. Some witnesses for the water company put it at three months. But although this condition was intermittent during the season, it recurred each season through a course of years and up to and including the present litigation. It cannot therefore be as-

scribed to accidental or temporary imperfections in the company's system. It was inherent, and lasting though it did, through many years, no successful attempt was made to remedy it. As said in the Columbus case supra: "That the source of supply is at times adequate and wholesome is not enough. The wants of the public must, under all conditions, be supplied."

The plaintiff company failed in its duty in these important respects and thus lost its right to object to the erection of a competitive plant by the defendant city. The primary relief (a) asked by the bill cannot be granted.

(B)

For the reasons last stated and in view of Columbus vs. Mercantile Co. supra the breach of duty by the plaintiff Company justified the abrogation of Ordinance Ten by Ordinance 197. The relief (b) prayed in the supplemental bill must accordingly be denied, except that a reasonable time, which the court fixes at six months, is allowed the plaintiff to remove its property from any property of the City of which the Company has possession by virtue of its franchise.

(C)

From the proofs the city's filtration plant as operated does not pollute the water flowing into plaintiff's system. Nor is the house of which complaint is made as yet in use nor does it appear that when put in use, it will be injurious to the plaintiff. The relief asked under heading (c) is denied.

(D)

The court permitted an amendment to the bill so that plaintiff might pray a judgment for the rents due from the city for hydrants. The right to these date back to Ordinance No. Ten and in dealing with the companys's rights under that ordinance, complete equity would be done only by a settlement of this as well as other phases of the case. The proofs show that whatever the quality of the water as hereinbefore discussed the contract was not breached by the quantity of water furnished for hydrants. The city received this. The rentals claimed in the bill are accordingly found due. The counter claim of the city is without merit and is disallowed. While the court has not granted the principal relief asked that does not interfere with its protecting other rights germane to and asked for in the bill. Siler vs. L. N. R. R.

Co. 213 U. S. 175. Then the water rentals will be protected by the decree.

(E)

The joint occupancy by the city with the plaintiff company of the Lake Maloya site is by virtue of an order made in a condemnation suit pending in the State Court, a suit to which the parties hereto are all parties, and which is proceeding to final determination in regular course of judicial procedure. It is to be assumed that plaintiff's rights will be fairly protected in that Court Court. Relief (e) is accordingly denied.

A decree may be drawn in accordance herewith and presented for signature. The costs will be divided, plaintiff to pay three-fourths.

Santa Fe, New Mexico, this February 9th, 1916.

WM. H. POPE,
U. S. District Judge.

Endorsed: Filed, February 9, 1916, Harry F. Lee, Clerk.

(Order, April 20, 1916, modifying opinion, Filed February 9, 1916.)

This cause coming on for hearing upon certain objections and exceptions to the decision of the court heretofore made and entered herein on the 9th day of February, 1916, and the parties being present by their respective counsel, and the court having heard the arguments of counsel on such objections and exceptions, and being fully advised in the premises;

It is ordered that said decision be modified in the following respects:

First. That the amount of fire-hydrant rentals for which it was found the plaintiff was entitled to judgment be modified and changed from the sum of $14,646.06 to $8,680.02, said last amount being arrived at by determining the amount thereof under the price set forth in Ordinance No. 104, with interest thereon at ten per cent from the respective dates when said fire-hydrant rentals became due. To this modification the plaintiff by its counsel object and except.

Second. That said decision be modified so as to permit the plaintiff to acquire any such rights of way through the streets, alleys and other public places of the City of Ralton as it may be able to obtain by agreement, condemnation or otherwise.

Done this 20th day of April, A. D., 1916.

WM. H. POPE,
U. S. District Judge.

(Decree, Filed April 20, 1916.)

This cause now coming on for final determination and the entry of the decree herein, and the parties having each introduced their evidence in this cause, and the cause having been fully argued by counsel, and the decision of this court having been entered on the 9th day of February, A. D. 1916, which decision was modified by an order entered this day, and the parties being present by their respective counsel, and the court being fully advised in the premises, doth find:

First. The defendant City in and by the terms of its Ordinance No. 10, set out in the complaint of plaintiff herein, granted unto the plaintiff the exclusive right of way and right and privilege to construct, operate and maintain waterworks in and near the town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, as well as for the better protection of the property of the town from fires, for a term of twenty-five years from the 15th day of July, A. D. 1891, and for such purpose granted the exclusive right to lay its pipes and mains in the streets and alleys of said city.

Second. Defendant City, before the expiration of the life of said contract as expressed in said Ordinance, constructed and completed its system of waterworks, and declared its intention to furnish water to the inhabitants of said City for the purposes mentioned in said Ordinance No. 10 in competition with plaintiff herein.

Third. That as to the issuses raised by the original bill of complaint herein and supplemental and amended answer of the defendant thereto, such issues are found in favor of the dedefendant upon the ground that the plaintiff in and during a number of years immediately preceding the filing of the original bill herein failed to furnish said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, the respects in which plaintiff did so fail being more specifically set out in paragraph "A" of the said opinion and decision of this court.

Fourth. That as to the issues made by the supplemental bill of complaint and the answer thereto, the court doth find the same in favor of the defendant, for the reason that said Ordinance No. 10 gives to the defendant the power of revocation: except, however, that the plaintiff is entitled to a period of six months from the date of this decree in which to remove its property from ahy property of the city of which the com-

pany has possession by virtue of its franchise; said finding being without prejudice to the right of the plaintiff to acquire such rights of way to the streets, alleys and public places in the City of Raton as it may be able to obtain by agreement, condemnation or otherwise.

Fifth. That as to the issues joined by the amendment to the bill of complaint and the answer thereto, the court doth find the same in favor of the defendant; except that such finding shall be without prejudice to the plaintiff presenting such defenses as it may be advised is proper in that certain cause now pending in the Eighth Judicial District Court of the State of New Mexico in and for Colfax County, and known therein as Number 4055, by which the defendant is seeking by eminent domain to obtain rights in Lake Maloya and other property; and except also that the court finds that the plaintiff is entitled to judgment against the defendant in the sum of $8,680.00 for fire-hydrant rentals from July 1, 1912, to July 1, 1915.

Now, therefore, it is Ordered, Adjudged and Decreed;

First. That plaintiff's original bill of complaint, and the cause of action therein stated, be, and the same is hereby, dismissed, and that the temporary injunction issued thereon be, and the same is, hereby dissolved and held for naught.

Second. That the supplemental bill of complaint, and the cause of action therein stated, be, and the same is hereby, dismissed, except that the plaintiff shall have, and is hereby given, six months from the date of this decree in which to remove its property from the property of the defendant of which the plaintiff has possession by virtue of its franchise contained in Ordinances No. 10 and No. 104 of the City of Raton, and that during said six months the defendant, its officers, agents and servants shall be, and hereby are, enjoined from removing or attempting to remove any of the said property of the plaintiff from the property of the defendant of which the plaintiff has possession by virtue of a certain franchise, and is further enjoined from prosecuting cause No. 4267 in the Eighth Judicial District Court of the State of New Mexico, and any other proceeding in any court for the purpose of compelling such removal, prior to the expiration of said six months; that the injuction hereby granted shall expire at the expiration of six months from date of this decree.

Third. That the relief prayed for by the amendment to the bill of complaint for an injunction against the possession of plaintiff's property by the defendant under order of the Dis-

trict Court of Colfax County in the Case referred to in the findings herein is denied, but said judgment shall be without prejudice however to the right of the plaintiff to present as a defense or as defenses in said eminent domain proceedings the matters set forth in said amended bill of complaint.

Fourth. That it is ordered, adjudged and decreed that the plaintiff have and recover of and from the defendant upon said amendment to the bill of complaint the sum of $8,680.02 for fire-hydrants rentals from July 1, 1912, up to July 1, 1915.

It is further ordered, adjudged and decreed that the plaintiff pay three-fourths and the defendant one-fourth of the costs of this cause, to be taxed in accordance with law.

To each and all of which findings and rulings of the court, and to which decree, the plaintiff by its counsel duly excepted.

Done in open court this 20th day of April, A. D. 1916.

WM. H. POPE,
U. S. District Judge.